(18,837.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 219.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Eighth Circuit.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company, Defendant in Error.
No. 1762.

In error to the circuit court of the United States for the district of Colorado.

Filed May 22, 1902.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered, that heretofore and on, to wit, the 1st day of November, A. D. 1897, came Scott Ashton, Esquire, attorney for the defendant, and filed in said court a transcript of proceedings heretofore had in the district court of the fourth judicial district of the State of Colorado, sitting in and for the county of El Paso, in a certain cause in said district court lately pending wherein The Creede and Cripple Creek Mining and Milling Company was plaintiff, and The Uinta Tunnel Mining and Transportation Company was defendant.

And the said transcript is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
State of Colorado, County of El Paso, }

Pleas before the Honorable Ira Harris, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court house in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of May, A. D. 1897 (being the second Monday of May), and of the Independence of the United States the one hundred and twentieth.

Present: Hon. Ira Harris, judge aforesaid. Henry M. Blackmer, district attorney. W. S. Boynton, sheriff of said county. Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 15th day of

June, A. D. 1897, there was filed in the office of the clerk of said court, the petition, which is in words and figures as follows, to wit:

2 STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Petitioner,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Respondent.

Petition.

Comes now the petitioner above named and shows to the court and gives the court to understand:

First. That petitioner and respondent are each corporations duly organized and doing business in the county of El Paso and State of Colorado, pursuant to the laws of said State.

Second. That petitioner is the owner in fee of the "Ocean Wave" and the "Little Mary" Lode mining claims situate on Battle mountain in the Cripple Creek mining district in the said county and State.

Third. That the respondent is the owner of a certain tunnel known as the "Uinta tunnel" which tunnel commences on the west side of the said Battle mountain, and which said tunnel is being run by the respondent for the purpose of opening and working mines and removing ore therefrom. That in opening and operating the said tunnel the said respondent has entered into the aforesaid mining claims owned by the petitioner, under the surface thereof, and has taken and is now taking and threatens to continue to take a large quantity of ore, the property of the petitioner from the said claims. That the petitioner has no method of ingress into the said tunnel through its own property or works and is therefore fully unable to ascertain the full extent of the aforesaid trespass committed on its property by the said respondent or the quantity or value of the ore taken and removed from the said claims by the respondent and that a knowledge of these facts is absolutely necessary to the petitioner to protect and enforce its rights and interests as against the respondent.

That the character of the said trespass, the extent of the injury done thereby and the quantity and value of ore removed as aforesaid can only be ascertained by an inspection, examination, and survey of the said tunnel and the workings and operations
3 therein carried on by the respondent within the said claims. That the aforesaid mining claims are in the possession of the

petitioner save in so far as such possession has been interfered with and disturbed by the said respondent as hereinbefore set out.

Fourth. That on the 2nd day of June, 1897, the petitioner made demand in writing upon the respondent to permit an inspection, examination, and survey of the aforesaid tunnel, and especially of that part thereof within the property of the petitioner for the purpose hereinbefore set forth, but that the respondent refused to permit the petitioner to make such inspection, examination, and survey, and still refuses so to do, although more than three days had expired since the said demand was made.

That a copy of the said notice served upon the respondent as aforesaid is attached hereto, same being Exhibit "A" and is hereby made a part hereof. That James Doyle, the person mentioned in said notice, and to whom the same is addressed, is, as your petitioner is informed and believes, the president of the said respondent company, and the reputed owner of substantially or practically all the stock thereof, and that your petitioner caused the said notice to be served upon the said Doyle in the belief and with the understanding that he was the proper person upon whom to make said request and has not, by the said Doyle or any one else, been informed to the contrary.

Wherefore, petitioner prays that this honorable court appoint a time and place for a hearing upon this petition, and order that notice thereof be served upon the respondent and that upon such hearing an order for inspection, examination, and survey of the said tunnel be made, said inspection, examination, and survey to be so made in such a manner, and at such time, and by such persons as the facts established shall warrant.

GUNNELL & HAMLIN,
Attorneys for Petitioner.

STATE OF COLORADO, } ss:
County of El Paso, }

J. F. Burns, being first duly sworn according to law, on oath deposes and says that he is the president of The Creede and Cripple Creek Mining and Milling Company, the petitioner in the foregoing proceeding; that he has read the foregoing petition and is acquainted with the contents thereof, and that the matters, statements, and allegations thereof are true.

J. F. BURNS.

4 Subscribed in my presence, and sworn to before me this 14 day of June, A. D. 1897.

[SEAL.]

EDGAR HOWBERT, *Clerk,*
By E. C. DAVIS, *Deputy.*

EXHIBIT "A."

COLORADO SPRINGS, COLO., *June* 5, 1897.

To James Doyle, Esq., owner of the Uintah tunnel.

DEAR SIR: Having been informed that in the operation of the Uintah tunnel which commences on the west side of Battle mountain, in the Cripple Creek mining district, county of El Paso, and State of Colorado, you are trespassing on the property of, and removing ore belonging to the undersigned, the Creede & Cripple Creek Mining & Milling Company, we would respectfully demand that you allow —— —— our agents, duly authorized and appointed for that purrpose and to act in our behalf, to enter into said Uintah tunnel and make an examination, inspection, and survey thereof, for the purpose of ascertaining whether or not you are so trespassing or so removing ore.

Respectfully,

THE CREEDE & CRIPPLE CREEK MINING & MILLING CO.,
By M. KINNEY, *Secretary.*

Indorsed: No. 5122. In the district court, El Paso county, Colo. The Creede & Cripple Creek Mining & Milling Co., plaintiff, *vs.* The Uinta Tunnel, Transportation & Mining Co., defendant. Petition. Filed in the district court of El Paso county, Colorado, Jun- 15, 1897. Edgar Howbert, clerk. By E. C. Davis, deputy. Gunnell & Hamlin, attorneys for petitioner, Colorado Springs, Colo.

And thereupon, and on to wit, the 15th day of June, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Petitioner,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Respondent.

Order.

The petition in the above entitled matter having been presented pursuant to the statute in such case made and provided,
5 asking for an order for an inspection, examination, and survey of the tunnel mentioned in said petition,

It is hereby ordered that Monday, the twenty-first day of June A. D. 1897, be appointed as the time for hearing said petition, at the court house in said county.

And it is further ordered that the petitioner serve notice upon the respondent of this order at least three days prior to said twenty-first day of June, 1897.

IRA HARRIS, *Judge.*

And thereafter, and on, to wit, the 19th day of June, A. D. 1897, there was filed in the office of the clerk of said court, the following complaint, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Defendant.

Complaint.

The above named plaintiff by Gunnell & Hamlin, and Thomas Bryant, & Lee, its attorneys, now comes and complaining of the defendant, for cause of action says:

I. That the plaintiff is a corporation organized and doing business under and by virtue of the laws of the State of Colorado, and during all the times hereinafter to be named was such corporation.

II. That by virtue of its articles of incorporation it is empowered and authorized to take, hold, own, possess, work, and develop mines and mining claims in the county of El Paso and State of Colorado, and to do such other things as are necessary or expedient in and about the general business of owning and operating gold and silver bearing mines and mining claims.

III. On information and belief, the plaintiff says that the defendant is a corporation organized under the laws of the State of Iowa; that the said defendant claims the right to do business within the State of Colorado by virtue of a compliance with the requirements of the laws of said State concerning foreign corporations, but
6 whether the said defendant has so complied, the plaintiff has not and can not obtain sufficient knowledge or information upon which to base a belief.

IV. That the plaintiff is and for more than five years last past has been, the owner in fee and in possession, except as hereinafter stated, of all those mines and mining claims situate in Cripple Creek mining district, county of El Paso, and State of Colorado, and known as the "Ocean Wave" and "Little Mary" Lode mining claims, being survey lot No. 8192, and evidenced by mineral certifi-

cate No. 338, and by patent of the United States to the plaintiff for said claims bearing date the twenty-first day of December, A. D. 1893, and recorded in the office of the clerk and recorder of deeds in and for said county, in Book 173, on page 16 of the records of said county.

V. That the said Little Mary and Ocean Wave Lode mining claims were duly located and discovered on, to wit, the second day of January, A. D. 1892, by J. B. Winchell and E. W. McNeal, and that the plaintiff's said patent to said premises relates back to the said date of discovery and location thereof, and takes effect at the said dates for all purposes given and provided by the laws of the United States and of the State of Colorado concerning mining claims.

VI. That the said Little Mary and Ocean Wave Lode mining claims are valuable only for the veins, lodes, ledges, or deposits of gold and silver ores which they and each of them contain.

VII. That on, to wit, the first day of January, A. D. 1897, the defendant by means of a tunnel driven into and underneath the said mining claims has wrongfully, unlawfully, and against the consent and without the knowledge of the plaintiff, ousted the plaintiff from the possession of so much of the said premises as has been penetrated by the said tunnel and have retained and still retain possession thereof.

VIII. That the said defendant, by means of and with the said tunnel, has entered as aforesaid into, upon and underneath the said premises, at a point about fifty feet (50 feet) south of the northwest corner of the Little Mary Lode mining claim, and has proceeded with said tunnel and ouster from said point southeasterly across the said Little Mary Lode mining claim, and into, upon and underneath and partly across the said Ocean Wave Lode mining claim, according to the best knowledge, information, and belief of the plaintiff, and threatens to, and will unless restrained by the injunction process of this court, continue the said tunnel across the said Ocean Wave Lode mining claim, and by drifts, cross-cuts, and
7 lateral workings within the said Little Mary and Ocean Wave Lode mining claims, proceed to develop, explore, work, and mine the said Little Mary and Ocean Wave veins, and extract, take away, remove, and sell the said valuable ores of the plaintiff and convert the proceeds thereof to its own use.

IX. The plaintiff further complaining, alleges:

That the said entry, trespass, and ouster of the plaintiff by the said defendant is a continuing one.

That the defendant falsely pretends and asserts the right of ownership in, and control and right to the possession of all veins lodes, and ledges within the said Little Mary and Ocean Wave Lode mining claims, denies the right of ownership and possession of the plaintiff thereto and therein notwithstanding its said patent as aforesaid, and as the plaintiff is informed and believes, has located or is about to locate or attempt to locate upon the said veins, lode mining claims of its own under the false pretense of owner-

ship thereof by right of discovery, thus involving the plaintiff in great and unnecessary expense, loss of time, and trouble in and about defending its ownership and right to the possession of the said premises and each and every part thereof, against the said wrongful and unlawful claims, pretenses and actions of the said plaintiff.

X. That the said plaintiff by virtue of the said ouster and trespass aforesaid has been damaged in a large sum of money, to wit, in the sum of two thousand five hundred dollars ($2,500.00) and that if the said defendant be permitted to continue to enter into, through, and across the said premises of the plaintiff, and to extract, mine, and take ore therefrom, or exploit the same for ore or for any purpose whatever, the plaintiff will be put to great, lasting, and irreparable loss, damage, and injury by virtue of the premises.

XI. That the said defendant is insolvent, and has no money, property or effects within the State of Colorado or elsewhere, so far as the plaintiff is informed and believes, out of which any judgment either for damages already sustained or for those which it will sustain in the event the defendant shall continue its said work and (made) good its threats and promises to take, extract, and remove ore from said premises and work in and upon the same, could be realized either in whole or in part.

Wherefore, the plaintiff prays judgment:

(1.) For the recovery of possession of the said Little Mary and Ocean Wave Lode mining claims.

(2.) For two thousand five hundred dollars ($2,500.00) damages as aforesaid.

(3.) For costs of suit.

8 And forasmuch as the plaintiff is wholly without remedy as to the matters and things hereinbefore set forth, save in a court of equity, may it please this honorable court to grant the plaintiff a temporary injunction issuing out of and under the seal of this honorable court and directed to the sheriff of the said county for service and return, commanding the said defendant, its agents, servants, attorneys, employés, and representatives, and each and every of them, wholly to desist and refrain from further working, mining, or extracting ore, or running drifts, stopes, cross-cuts, inclines, or any other work or works whatsoever within the said Little Mary and Ocean Wave Lode mining claims, the premises of the plaintiff, or any part or portion thereof, or from using the said tunnel for purposes of ingress or egress into, through, upon, across, or under the said Little Mary and Ocean Wave Lode mining claims, or either of them until the further order of this court in the premises, and that upon a final hearing of the matters and things herein set forth, the said injunction be made perpetual.

GUNNELL & HAMLIN AND
C. S. THOMAS,
Attorneys for Plaintiff.

STATE OF COLORADO, } ss:
County of El Paso, }

Personally appeared James F. Burns, who, being first duly sworn, according to law, says:

That he is president of the above named plaintiff, The Creede and Cripple Creek Mining and Milling Company; that he has read the above and foregoing complaint and that the matters and things therein stated are true according to his best knowledge, information, and belief.

JAMES F. BURNS.

Subscribed in my presence and sworn to before me this 18th day of June, A. D. 1897.

My commission expires Oct. 9, '99.

[SEAL.]

J. R. BISCHOF,
Notary Public.

Indorsed: No. 5122. In the district court, El Paso county, Colo. The Creede & Cripple Creek Mining and Milling Company, plaintiff, *vs.* The Uinta Tunnel Mining and Transportation Company, defendant. Complaint. Filed in the district court of El Paso county, Colorado, Jun- 19, 1897. Edgar Howbert, clerk. By E. K. Gaylord, deputy. Gunnell & Hamlin and Thomas, Bryant & Lee, attorneys for plaintiff, Colorado Springs, Colo.

* * * * * * *

9 And thereupon, and on, to wit, the 21st day of June, A. D. 1897, there was filed in the office of the clerk of said court the answer, which is in words and figures, as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court Sitting within and for said County.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Petitioner,
vs.
THE UINTAH TUNNEL, MINING AND TRANSPORTATION COMPANY, Respondent.

Answer.

Now comes the above named respondent, and for its answer to the petition of petitioner heretofore filed herein, says: That it denies each and every allegation and averment made and contained in said petition, save and except that respondent admits that the petitioner

claims to be the owner of the "Little Mary" and "Ocean Wave" Lode *and* mining claims mentioned and described in its petition; that the pretended notice that was served upon the respondent was mailed to James Doyle, the president of the respondent, by registered letter.

For a further answer herein, respondent states, that since the service of said notice, and before the commencement of this action, M. Kinney, the secretary and one of the directors of the petitioner, and John Harnan, one of the directors of the petitioner herein, have each, at various and sundry times, been notified to make an examination and inspection of the matters and things asked for in the petition of petitioner.

SCOTT ASHTON,
Attorney for Respondent.

STATE OF COLORADO, } ss:
County of El Paso, }

Scott Ashton being by me first duly sworn on oath, deposes and says:

That he is the attorney for the respondent, and that the respondent is a foreign corporation organized under the laws of the State of Iowa, and that as the attorney and agent, affiant makes this affidavit, and states that the matters and things hereinabove set forth are true, save and except those matters therein stated on information and belief, and as to those matters affiant believes it to be true.

SCOTT ASHTON.

10 Subscribed and sworn to before me this 21st day of June, A. D. 1897.

My com. expires Oct. 20th, 1899.

[SEAL.] LOUIS W. CUNNINGHAM.

Indorsed: No. 5122. In the district court, El Paso county, Colo. The Creede & Cripple Creek Mining Co., plaintiff, *vs.* The Uinta Tunnel Mining & Transportation Co., respondent. Answer. Filed in the district court of El Paso county, Colorado, Jun- 21, 1897. Edgar Howbert, clerk. By M. L. Taylor, deputy. Scott Ashton, attorney for respondent, Victor, Colo.

* * * * * * *

Pleas before the Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for the county of El Paso, in said State, in division one thereof, at a term begun and held at the court house in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of May (it being the second Monday), A. D. 1897, and of the Independence of the United States the one hundred and twentieth.

Present: Hon. Horace G. Lunt, judge aforesaid. Henry M. Blackmer, district attorney. W. S. Boynton, sheriff of said county. Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

And thereupon, and on, to wit, the 21st day of June, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, *Petitioner*,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Respondent.

Order.

The application of the petitioner for an inspection, examination, and survey of that part of the Uinta tunnel lying within and underneath the vertical boundaries of the "Little Mary" and "Ocean Wave" Lode mining claims described in said petition, this day coming on to be heard, and the petitioner appearing by A. T. Gunnell and C. S. Thomas, its attorneys, and the respondent appearing by Scott Ashton, Esquire, its attorney, and the court having heard the said petition and the reply thereto and the affidavits in sup-
11 port of and against the same, and being fully informed in the premises, it is considered that the prayer of the said petition be granted.

Wherefore, it is ordered that the said petitioner be and it is hereby permitted to make an inspection, examination, and survey of that part of the Uinta tunnel lying within and underneath the vertical boundaries of the Little Mary and Ocean Wave Lode mining claims, with one surveyor and three witnesses, according to the statute in such case made and provided. That the said surveyor and witnesses shall be permitted to enter into the said Uinta tunnel by the said respondent, and upon ascertaining and locating the point where the said tunnel crosses the westerly line of the Little Mary Lode mining claim, they shall be permitted to begin at said point and inspect, examine, and survey the said tunnel easterly to the point where the said tunnel crosses the easterly side line of the said Ocean Wave Lode mining claim, which point shall also be determined and located by the said surveyor and Victor G. Hills, surveyor, and H. E. Hills, F. G. Willis, and F. G. Peck, witnesses selected by the said petitioner, be and are hereby appointed as the surveyor and witnesses by whom such inspection, examination, and survey shall be made.

It is further ordered that the said survey shall begin on the 23rd day of June, A. D. 1897, and may continue from day to day thereafter until the same shall be completed, and the same shall be com-

pleted within a period of ten days from the date of the commencement thereof.

It is further ordered that the engineer of the respondent company may, if the respondent so desires, accompany the said surveyor and witnesses of the said petitioner at and during the times of making said inspection, examination, and survey, and notice shall be given the respondent 12 hours before going into the tunnel on each day.

And it is further ordered that the said surveyor and witnesses shall have free access to the said tunnel during the times herein mentioned between the hours of 9 o'clock a. m. and 5 o'clock p. m. of each day, for the purpose of such inspection, examination, and survey in conformity with this order, and no interference shall be made with such person or any of them while making said inspection, examination, and survey.

Done in open court at Colorado Springs in said county and State this twenty-first day of June, A. D. 1897.

HORACE G. LUNT,
Judge of the District Court.

12 And thereafter, and on, to wit, the 6th day of July, A. D. 1897, there was filed in the office of the clerk of said court the petition for removal, which is in words and figures, as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Defendant.

Petition for Removal.

To the honorable the district court of El Paso county, State of Colorado, and the honorable judges thereof:

Your petitioner, The Uinta Tunnel Mining and Transportation Company, respectfully shows unto this honorable court:

That it is the defendant in the above entitled cause; that the matter in dispute in said cause exceeds, exclusive of interest and costs, the sum or value of two thousand ($2,000) dollars, and that said suit is of a civil nature at common law, and that said suit is now pending and undetermined in the district court of said El Paso county, and that the time under the statute of the State of Colorado, and the practice of said court within which this defendant is required to appear and plead herein has not yet expired, nor has this defend-

ant, your petitioner, prior to the date hereof, appeared in said court nor plead to said complaint. That this is a suit between citizens of different States, in this, to wit, that the plaintiff, The Creede and Cripple Creek Mining and Milling Company, is a corporation duly organized and existing and doing business under and by virtue of the laws of the State of Colorado, and a citizen of the State of Colorado, and was such corporation and such citizen of Colorado at the time of the bringing of this action, ever since and now. That the defendant was at the time of the bringing of this action, ever since, has been, and now is, a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of Iowa, and at all of said times a citizen of the State of Iowa; so that this is a suit between citizens of different States in this, to wit, between the plaintiff, a corporation and citizen of the State of Colorado, and the defendant, a corporation and citizen of the State of Iowa.

13 And your petitioner offers herewith a bond with good and sufficient surety for his entering in said circuit court of the United States on the first day of its next session at the place to which this cause is removable, to wit, Denver, Colorado, a copy of the record in said suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make an order removing this cause to the circuit court of the United States sitting at Denver, Colorado, and approving said bond, and as in duty bound your petitioner will ever pray.

SCOTT ASHTON,
Attorney for Petitioner.

STATE OF COLORADO, }
County of Arapahoe, } ss:

James Doyle, of lawful age, being first duly sworn upon his oath says: That he is the president of The Uinta Tunnel Mining and Transportation Company, the defendant in the above entitled action and the petitioner herein; that he has read the above and foregoing petition for removal and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

JAMES DOYLE.

Subscribed and sworn to before me this 3rd day of July, A. D 1897.

My commission expires December 14, 1897.

[SEAL.] HARRY C. WATT,
Notary Public.

Indorsed: No. 5122. The Creede & Cripple Creek Mining & Milling Company, pl'ff, *vs.* The Uinta Tunnel Mining & Transportation Co., defendant. Petition for removal to U. S. circuit ct. Scott Ashton, att'y for def't. Filed in the district court of El Paso county, Colorado, Jul- 6, 1897. Edgar Howbert, clerk. By E. K. Gaylord, deputy.

And thereupon, and on, to wit, the 6th day of July, A. D. 1897 there was filed in the office of the clerk of said court, the bond on removal, which is in words and figures as follows, to wit:

14 STATE OF COLORADO, } *ss:*
County of El Paso, }

In the District Court.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Defendant.

Know all men by these presents, that we, the Uinta Tunnel Mining and Transportation Company, a corporation, as principal, and James Doyle and J. B. Cunningham, as sureties, are held and firmly bound unto the above named plaintiff, The Creede and Cripple Creek Mining and Milling Company, a corporation, in the penal sum of five hundred ($500) dollars, for the payment whereof well and truly to be made unto the said plaintiff, its successors and assigns, we bind ourselves, our heirs, successors, representatives and assigns jointly and severally firmly by these presents.

Yet upon these conditions, that whereas, said The Uinta Tunnel Mining and Transportation Company, the defendant in the above entitled action, has petitioned the district court of El Paso county, State of Colorado, for the removal of a certain cause therein pending wherein the above named The Cre-de and Cripple Creek Mining and Milling Company is plaintiff, and the said The Uinta Tunnel Mining and Transportation Company is defendant, from said district court of El Paso county, Colorado, to the circuit court of the United States in and for the district of Colorado, now, if the said petitioner, The Uinta Tunnel Mining and Transportation Company shall enter in the said circuit court of the United States on the first day of its next session at the place to which said cause is removable, a copy of the records in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this — day of July, A. D. 1897.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY,
By JAMES DOYLE, *Its President.*
J. B. CUNNINGHAM,
JAMES DOYLE.

15 STATE OF COLORADO, } ss:
County of El Paso, }

We, James Doyle and J. B. Cunningham, whose names are subscribed to the above bond, being first duly sworn, each for himself says; that he is a resident and freeholder within said county; that he is worth the sum specified in said undertaking as the penalty thereof, over and above his just debts and liabilities in property not exempt by law from execution.

JAMES DOYLE.
J. B. CUNNINGHAM.

Subscribed and sworn to before me this 3rd day of July, A. D. 1897.

My commission expires Dec. 4, 1899.

[SEAL.] J. ELMER PARKISON,
Notary Public.

Indorsed: No. 5122. The Creede & Cripple Creek Mining & Milling Co., pl'ff, *vs.* The Uinta Tunnel Mining and Transportation Co. def't. Bond for costs. Approved the within bond this 6th day of July, 1897. Ira Harris, judge. Scott Ashton, att'y for def't. Filed in the district court of El Paso county, Colorado. Edgar Howbert, clerk. By E. K. Gaylord, deputy.

Pleas before Honorable Ira Harris, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court house in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of May (it being the second Monday) A. D. 1897, and of the Independence of the United States, the one hundred and twenty-first.

Present: Hon. Ira Harris, judge aforesaid. Henry M. Blackmer, district attorney. W. S. Boynton, sheriff of said county. Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered, that heretofore and on to wit, the 6th day of July, A. D. 1897, the same being one of the days of the regular May, A. D. 1897 term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Petitioner,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Respondent.

At this day in open court comes the defendant by its attorney, Scott Ashton, Esquire, and the said defendant having
16 heretofore presented and filed its petition for the removal of said cause to the circuit court of the United States for the district of Colorado, and having also on the same day filed its bond for such removal, and the court having considered the same,

It is ordered by the court that the said petition and bond be and they are hereby approved; and that this action be, and the same hereby is removed to the said circuit court: and let the clerk of this court make a transcript of the papers in this behalf, together with all orders had and entered of record herein, and certify the same to said circuit court of the United States for the district of Colorado with all convenient speed upon the payment of all costs remaining due in this action.

And thereupon, and on, to wit, the 16th day of July A. D. 1897, there was filed in the office of the clerk of said court the summons which is in words and figures as follows, to wit:

STATE OF COLORADO, } *ss:*
County of El Paso, }

In the District Court.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Defendant.

Summons.

The People of the State of Colorado to The Uinta Tunnel Mining and Transportation Company, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff in the district court of El Paso county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by defalt will be taken against you according to the prayer of the complainant, and if a copy of the complaint in the above entitled

action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

17 The said action is brought by the plaintiff to obtain judgment against you for the recovery of possession of the Little Mary and Ocean Wave Lode mining claims, situate in the Cripple Creek mining district, El Paso county, State of Colorado, for two thousand five hundred dollars damages alleged to have been sustained by reason of a certain ouster and trespass; for costs of suit; and that a temporary writ of injunction issue against you commanding you, your agents, servants, attorneys, employees, and representatives, and each and every of them, wholly to desist from further working, mining, or extracting ore, or running drifts, stopes, crosscuts, inclines, or any other work or works whatsoever within the said Little Mary and Ocean Wave Lode mining claims, the premises of the plaintiff, or any part or portion thereof, or from using a certain tunnel driven under said Little Mary and Ocean Wave lodes, for the purpose of ingress and egress into, through, upon, across, or under the said Little Mary and Ocean Wave Lode mining claims or either of them until the further order of this court in the premises, and that upon a final hearing of the matters and things herein set forth, the said injunction be made perpetual, as will more fully appear from the complaint in said action to which reference is here made; copy of which is hereto attached.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will apply to the court for the relief herein demanded.

Given under my hand and the seal of said court, at Colorado Springs, in said county, this 19th day of June, A. D. 1897.

EDGAR HOWBERT, *Clerk*,
[SEAL.] By M. L. TAYLOR, *Deputy*.

STATE OF COLORADO, }
County of El Paso, } *ss*:

I do hereby certify that I have duly served the within summons together with a copy of the complaint in the within stated action, on this 28th day of June, A. D. 1897, by delivering to and leaving with James Doyle, president of The Uinta Tunnel Mining and Transportation Company, the said defendant personally in the county of El Paso, a copy of the said summons, together with a copy of the complaint in the action therein mentioned, thereto attached.

W. S. BOYNTON, *Sheriff*,
By F. E. BOYNTON, *Deputy*.

18 Indorsed: (Original.) No. 5122. Summons. In district court, El Paso county. The Creede & Cripple Creek Mining and Milling Co., plaintiff *vs.* The Uinta Tunnel Mining & Transpor-

tation Co., defendant. State of Colorado, county of El Paso. Office of the sheriff of said county, June 21st, A. D. 1897. I hereby certify that I received the within summons on the 21st day of June, 1897, at 11:20 o'clock a. m. W. S. Boynton, sheriff. By R. C. Bradfield, deputy. Filed in the district court of El Paso county, Colorado, Jul. 16, 1897. Edgar Howbert, clerk. By E. C. Davis, deputy. Sheriff's fees, service, .50, mileage & ex. 5.00. Total, 5.50. Gunnell & Hamlin, & Thomas, Bryant, and Lee, attorneys for plaintiff.

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado, within and for El Paso county, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all papers on file and all orders had and entered of record in a certain cause lately pending in said court on the civil side thereof, wherein The Creede and Cripple Creek Mining and Milling Company was petitioner, and The Uinta Tunnel Mining and Transportation Company was respondent, as the same appear on file and of record in this office remaining.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Colorado Springs, this 30th day of July, A. D. 1897.

[Seal District Court, El Paso County.]

EDGAR HOWBERT, *Clerk*,
By E. C. DAVIS, *Deputy*.

Indorsed: 3658. U. S. circuit court. The Creede & Cripple Creek Mining & Milling Company *vs.* Uintah Tunnel Mining & (&) Transportation Company. Transcript from dist. court, El Paso county. Filed Nov. 1, 1897. Robert Bailey, clerk.

70th Day, Tuesday, February 8th, A. D. 1898.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 2d day of November last past.

THE CREEDE AND CRIPPLE CREEK MINING and Milling Company *vs.* THE UINTAH TUNNEL MINING AND TRANSportation Company.	3658.	In Chancery.

Bill for Inspection and Survey and for Injunction.

At this day comes the complainant, by W. H. Bryant, Esquire, its solicitor, and thereupon on its motion, it is ordered by the
19 court that the respondent plead, answer, or demur to the bill of complaint herein as it shall be advised within thirty (30) days from this day.

Eightieth Day, November Term, Saturday March 12th, A. D. 1898.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the second day of November last past.

THE CREEDE AND CRIPPLE CREEK MINING and Milling Company
vs.
THE UINTA TUNNEL MINING AND TRANSPORtation Company. } 3658. In Chancery.

Bill for Inspection and Survey and for Injunction.

At this day comes the complainant by C. S. Thomas, Esquire, its solicitor, and the respondent by Chas. J. Hughes, Jr., Esquire, its solicitor, also comes.

And thereupon, on motion of Chas. J. Hughes, Jr., Esquire, solicitor for the respondent,

It is ordered by the court, that the hearing on the application of the complainant for an injunction herein, be and the same is hereby continued to the 21st instant.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss.:*

In the Circuit Court of the United States for the District of Colorado.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Defendant.

Motion.

Now at this day comes the defendant in the above entitled action and moves this honorable court for an order requiring the plaintiff herein to separate and separately plead and state its alleged and pretended causes of action at law from its alleged and pretended causes of action in equity, and to plead and state in separate pleadings, the alleged causes of action at law, and for which he demands legal relief, and his alleged suit in equity, and for which he demands equitable relief, and to file one of the said pleadings on the law side of this court, and the other of said pleadings on the chancery side of this court. and for grounds of this motion, this defendant shows unto this honorable court.

That said action was commenced by the filing of a complaint in the district court of El Paso county, which said complaint stated legal and equitable causes of action, and claimed and demanded legal and equitable relief, that the same has been properly removed into this honorable court, and that said plaintiff has not repleaded or separately stated said legal and equitable alleged causes of action.

CHAS. J. HUGHES, JR., AND
SCOTT ASHTON,
Attorneys for Defendants.

Indorsed: No. 3658. In circuit court. The Creede and Cripple Creek M. M. Co. *vs.* The Uinta Tunnel Mining and Transportation Company. Motion to separate and separately plead. Filed Mar. 14, 1898. Robert Bailey, clerk. Chas. J. Hughes, Jr. and Scott Ashton, atty's for defendants.

Ninety-second Day, November Term, Friday, April 1st, A. D. 1898

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 2d day of November, 1897.

THE CREEDE AND CRIPPLE CREEK MINING and Milling Company
vs.
THE UINTA TUNNEL MINING AND TRANSPORTation Company. } 3658 In Chancery.

Bill for Inspection and Surveg and for Injunction.

This cause having heretofore and at this term come on to be heard on the motion of the complainant for a temporary injunction was argued by counsel, C. S. Thomas, Esquire, appearing for the complainant, and C. J. Hughes, Jr., Esquire, appearing for the respondent, and by the court taken under advisement, and the court having considered the matter and being now fully advised in the premises:

It is ordered by the court for good and sufficient reasons to the court appearing that the said motion be and the same is hereby denied.

21 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMpany, Complainant,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Defendant.

Answer.

This defendant now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, answering, saith:

This defendant admits that the complainant, The Creede and Cripple Creek Mining and Milling Company, is a corporation organized and existing under the laws of the State of Colorado, as this defendant is informed and believes, in compliance with and by virtue of the requirements of the laws of the State of Colorado, as stated in said complaint.

Defendant further answering says: That it admits that by virtue of said articles of incorporation complainant is authorized to take hold, own, possess, work, and develop mines and mining claims in the county of El Paso, State of Colorado, and do such other things as are necessary or expedient in or about the general business of owning and operating silver bearing mines and mining claims.

Defendant further answering says, that it admits that it is a corporation organized under the laws of the State of Iowa, and doing business in the State of Colorado by virtue of full compliance with the requirements of the laws of the State of Colorado concerning foreign corporations.

Defendant further answering denies, that the complainant is now or ever was the owner in fee simple of the pretended Ocean Wave and Little Mary Lode mining claims, but admits upon information and belief that the said complainant has by some means obtained an alleged patent for the said Ocean Wave and Little Mary Lode mining claims which said patent the defendant alleges is and should be wholly null and void, because the same was not
22 obtained or issued in pursuance of the statutes of the United States therein and providing for the issuance thereof.

And defendant further alleges that said Ocean Wave and Little Mary Lode mining claims or each thereof were not located upon discovery veins at all, and that no vein whatever was ever uncovered or discovered in the discovery shaft of said Ocean Wave lode or of the said Little Mary lode.

Defendant further answering denies, that the complainant is now or for more than the five years last past or at any other time has been the owner of and in the possession or entitled to the possession of the premises claimed as the Ocean Wave and Little Mary Lode mining claims, situate in the Cripple Creek mining district, county of El Paso, State of Colorado.

Defendant further answering denies, that the said Ocean Wave and Little Mary Lode mining claims were duly located and discovered or located or discovered on, to wit, the second day of January, A. D. 1892, or at any other time, by J. B. Winchell or E. W. McNeal

or any other person, and that there never was any location whatever made of said pretended Ocean Wave and Little Mary Lode mining claims.

Defendant further denies that by means of a tunnel driven into and underneath said Ocean Wave and Little Mary Lode mining claims this defendant has wrongfully and unlawfully or wrongfully or unlawfully ousted complainant from the possession of so much of the said premises as has been penetrated by said tunnel; and further denies that such penetration by said tunnel as stated in complainant's complaint was made against the consent and without the knowledge of the complainant, but on the contrary this defendant alleges the fact to be that the officers of the Creede and Cripple Creek Mining and Milling Company and particularly the directors thereof and those in the possession, control, and management of the workings of said pretended Ocean Wave and Little Mary Lode mining claims, for more than a year prior to the commencement of the action herein have had full knowledge of the driving of the tunnel of the defendant into, through, and across said pretended Ocean Wave and Little Mary Lode mining claims, and that the same was so driven into, through, and across said pretended Ocean Wave and Little Mary Lode mining claims with the knowledge and consent of complainant, and with the knowledge and consent of those in the possession of said pretended Ocean Wave and Little Mary Lode mining claims in the working and developing thereof, and defendant further says that after said tunnel had been driven into, through, and across said pretended Ocean Wave and Little
23 Mary Lode mining claims, James F. Burns, John Harnan, and others, who are now directors and large stockholders of complainant, and were directors and large stockholders of the Portland Gold Mining and Milling Company, purchased a large portion and a control of the capital stock of the complainant, and that they purchased said stock after said tunnel had been driven into, through, and across said pretended Ocean Wave and Little Mary Lode mining claims by and with the consent of the officers and directors thereof as above stated, for the purpose and with the intent to annoy and harrass this defendant by suits and litigation, and to impede the progress of the tunnel owned by this defendant, and for the purpose of defeating if possible, the rights of defendant and said tunnel. And with the intent and purpose to delay, hinder, annoy, and harrass this defendant; and defendant charges that the parties who own the majority of the stock and control of complainant and are now directors of complainant and were such directors at the time of the institution of said suit purchased said stock and became such directors after defendant had penetrated said pretended Ocean Wave and Little Mary Lode mining claims with its tunnel, and for the purpose and sole purpose to commence this suit as is hereinbefore stated.

Defendant further answering denies; that it, by means of and with the said tunnel, has entered the aforesaid premises for the purpose stated in the eighth paragraph of complainant's complaint, and

denies that it threatened to or will unless restrained by the injunctive process of this court, cross-cut the workings of said pretended Ocean Wave and Little Mary Lode mining claims, and proceed by driving, cross-cutting, or other means, to work said pretended Ocean Wave and Little Mary Lode mining claims; and extract, take away, remove, or sell valuable ores of the complainant, and convert the proceeds thereof to its own use, but on the contrary defendant states that its tunnel had been driven into said pretended Ocean Wave and Little Mary Lode mining claims long before the commencement of the above entitled action, and that no veins of ore have ever been discovered and uncovered, or discovered or uncovered by the driving of the bore of said tunnel into, through and across and along said pretended Ocean Wave and Little Mary Lode mining claims.

Defendant further answering denies that it ever broke down, attempted to break down, or threatened to break down or remove or sell any valuable ores at all from said pretended Ocean Wave and Little Mary Lode mining claims, and denies that the alleged entry, trespass, or ouster of the complainant by the defendant as set forth in complainant's complaint is a continuing one, and alleges that there was no ouster at all.

24 Defendant further answering denies that it falsely pretends to assert the rights of ownership in, control, and right to the possession of all lodes, ledges and veins within said pretended Ocean Wave and Little Mary Lode mining claims as is alleged in complainant's complaint, but on the contrary alleges, that it had the right to run and operate its said tunnel, as is hereinafter more fully set forth.

Defendant further answering denies that it has located or ever located upon any vein, lode, or mining claim within the vertical side lines of said pretended Ocean Wave and Little Mary Lode mining claims, or that it located any veins within the surface boundaries of said pretended lode mining claims whatever.

Defendant further answering denies that by any act of it, it has attempted to or will involve complainant in any great and unnecessary expense or loss of time, and trouble, as alleged and set forth in complainant's complaint, and defendant further denies that any act of it has or will cause the complainant loss of time or trouble in and about defending complainant's pretended ownership or pretended right to possession of the said premises, and defendant further denies that any act on its part in and about said premises has been unlawful and wrongful or unlawful or wrongful.

Defendant further answering denies that complainant by virtue of the said pretended ouster or trespass has been damaged in the sum of twenty-five hundred dollars ($2500) or in any other sum whatever.

Defendant further answering denies that complainant by reason of any act on its part as set forth in complainant's complaint would be put to great, lasting, or irreparable loss, damage, or injury or be put to any loss, damage, or injury whatever.

Defendant further answering denies that it is insolvent, and has

no property, money, or effects within the State of Colorado or elsewhere, out of which to satisfy any judgment for damages already alleged to have been sustained, or for those damages that complainant alleges may be sustained in the future as set forth in complainant's complaint, but on the contrary this defendant alleges and avers that it is wholly solvent and able to respond to any damages that complainant may be able to obtain or recover from defendant in any action that complainant may bring against defendant.

Defendant further answering denies that the pretended discovery and location or discovery or location of the said pretended
25 Ocean Wave and Little Mary Lode mining claims, was made before the commencement of said Uinta tunnel.

Defendant further answering says that the patent of the United States issued for said Ocean Wave and Little Mary Lode mining claims was issued subject to the acts of Congress in reference to tunnel rights and that the defendant, The Uinta Tunnel Mining and Transportation Company and its grantors had, by reason of the location of said Uinta tunnel, the right of, in, and to, any and all lodes, veins, and mining claims that it might cut or intersect in the driving of said tunnel, as is guaranteed the locators of said tunnel in and by virtue of sec. 2323 of the Rev. Stat. of the United States, and defendant further alleges that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary Lode mining claims, and by virtue of which it claimed the right to patent the same under the laws of the United States was not made until long after the location of said Uinta tunnel, and at a time when said locators thereof were well advised and knew that said tunnel had been located, and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of the United States therein, providing for the location and prosecution of such tunnel and defining and determining the rights pertaining thereto, and that said pretended Ocean Wave and Little Mary Lode mining claims, so far as the same may now be claimed by said complainant, was taken and are held subject to the rights of this defendant as the owner of said Uinta tunnel, located in accordance with sec. 2323, Rev. St. of the U. S. and also subject to the rights of this defendant to cross said claim and to drive drifts therein.

Defendant further answering denies that complainant is entitled to the relief prayed for in and by the prayer of its bill of complaint or any thereof, or any whatever.

Defendant further answering by way of further answer and affirmative defense to the plaintiff's said bill of complaint, and the matters and things therein alleged and set up, respectfully alleges:

First. That the defendant, The Uinta Tunnel Mining and Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Iowa, and doing business in the State of Colorado, by virtue of a full compliance with the requirements of the laws of the State of Colorado concerning
26 foreign corporations, and that the same was organized for the

purpose among other things of owning, operating, and developing lodes and lode mining claims in the county of El Paso, and State of Colorado, and that it now is and during all the times hereinafter mentioned was the owner by itself and its grantors, and in the possession of the Uinta tunnel, and the tunnel site location, and of all rights and privileges thereunto belonging and appertaining.

Second. That the said Uinta tunnel and tunnel site location was made under and in full compliance with the provisions of section 2323 of the Revised Statutes of the United States, and the rules and regulations adopted by the Interior Department of the United States thereunder, and was located on, to wit, the 13th day of January, A. D. 1892, as will more fully appear from the location certificate thereof as more fully appears in and by the records of the county of El Paso where the same duty is duly and at length recorded in Book 79 at page 492 of the records of said county, that this defendant acquired the said Uinta tunnel and tunnel site location, with all the rights, properties and possessions thereunto appertaining or belonging on or about the 16th day of May, A. D. 1896, and this defendant alleges that prior to the acquisition by it of the title thereof work had been diligently prosecuted upon said tunnel from the time of its location up to the time of the purchase thereof by this defendant; that the same was prosecuted in full compliance with the provisions of section 2323 of the Revised Statutes of the United States; that at no time was the work abandoned, neglected, or discontinued for any consecutive period of six months; but on the contrary the same was prosecuted with due diligence at all times prior to the purchase thereof by said defendant, and that from the time of the purchase thereof by said defendant hitherto, the defendant has prosecuted the work therein and thereon with great diligence for the purpose of boring said tunnel, and also for the discovery of veins therein, and in the manner and to the extent provided for under and by virtue of said section 2323 of the Revised Statutes of the United States, and that at no time since this defendant has been the owner thereof has work thereon *has* been discontinued for a period of six consecutive months. And this defendant further alleges that this defendant and its grantors have expended in and upon said tunnel the sum of more than $125,000, and in addition to the said expenditures have also expended upon surface work, improvements, and expenses, a further sum of not less than 10,000.

Third. Defendant further answering alleges that its work and the work of said grantors in and upon the said tunnel has been
27 open and without concealment and that the same has been at all times prosecuted under the claim of the said defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location under and by virtue of the laws of the United States and under the terms and provisions of section 2323 of the Revised Statutes of the United States, and that the expenditures thereof and the developments made thereon have been made in com-

pliance with the terms and provisions of and in reliance upon the said statutes. And this defendant further alleges upon information and belief that the said location at the time of its location, was designated upon the ground by a line run through the trees and undergrowth upon the side of the mountain and by stakes at regular intervals along the said line duly marked with the name of the tunnel, so that the same could be easily and fully designated along and upon the ground and surface thereof, and that the same had been so marked continuously by stakes at regular intervals along the line of said tunnel since the defendant The Uinta Tunnel Mining and Transportation Company has been the owner thereof so that the same could be easily and fully designated upon and along the surface of said ground, and that this defendant and its grantors have at all times since the location of said tunnel hitherto claimed the right to own, extend, operate and develop the said tunnel as a tunnel location under the terms and provisions and for the purposes designated in and by section 2323 of the Revised Statutes of the United States.

Fourth. Defendant further answering alleges and avers; that said Uinta tunnel entered the westerly side lines of the pretended Little Mary lode at a point distant from the mouth or portal of the said tunnel about 550 feet at a time which was more than one year prior to the commencement of the above entitled action; and that said tunnel was driven through the said pretended Little Mary lode with great diligence and was driven on its course through the side lines of the said pretended Ocean Wave lode, and when the said tunnel had been driven through the said pretended Ocean Wave and Little Mary Lode mining claims, it was distant from the mouth or portal thereof about 1175 feet; and that in running said tunnel through said prefended Ocean Wave and Little Mary lodes defendant drove the same a distance of about 625 feet; and that the same was driven through the said pretended Ocean Wave and Little Mary lodes with the full knowledge and consent of complainant and at great cost and expense as above set forth, and was so driven through said pretended lodes more than a year prior to the commencement of the above entitled action without any protest or objection made by complainant, its officers or employees, or agents; and that
28 the driving of said tunnel was acquiesced in by the complainant, its officers, servants, and employees, and that after driving said tunnel through and across said pretended Ocean Wave and Little Mary lodes defendant continued the prosecution of its said tunnel and drove the same to a distance of about 2200 feet and until it reached and penetrated the territory that is claimed by the Portland Gold Mining Company, and it was after said tunnel had reached said distance that complainant instituted the above entitled action, and the same was then instituted by complainant because, for the reason and on account of the matters and things herein recited and set forth.

Fifth. Defendant further answering alleges and avers that at a point distant from the mouth or portal of said tunnel and in and

upon the line thereof about 1931 feet, and upon the ground embraced within the surface boundaries of the location of said tunnel and within the location of the bore thereof, and which location of said tunnel was made long prior to any location upon said territory by any other person or persons, in driving its said tunnel defendant discovered, uncovered, and disclosed a vein and lode in rock in place bearing gold, silver, and other precious metals which said vein entered said tunnel and was parallel to the line of said tunnel for a distance of more than 500 feet, and is still within said tunnel and within the breast thereof, and that the same is now on the line and bore thereof near the south line of said tunnel, and that the said tunnel is at present driven into the mountain for a distance slightly exceeding 2200 feet, and is through and beyond the easterly side line of the said pretendedc Oean Wave lode about 1100 feet; and defendant further alleges that the said vein is intersected, uncovered, and discovered in said tunnel as above set forth, and is described as the Uinta Tunnel No. 23 lode, and is a cross lode to any lode uncovered and discovered in said territory by any person or persons, and that the same was never uncovered or discovered by any person or persons until the same was discovered and cut as aforesaid by the said Uinta tunnel.

Sixth. Defendant further answering alleges that in driving said tunnel it has followed said cross lode by it discovered as aforesaid upon territory which was segregated and marked and upon ground appropriated by said tunnel location prior to any other location thereof, as it had full right and authority so to do in and by virtue of section 2336 Revised Statutes of the United States, and defendant located said cross lode by calling it the Uinta Tunnel No. 23 lode and mining claim and by placing at the mouth of said tunnel in a conspicuous place a location certificate showing the general
29 course of said lode and number of feet claimed on each side of the discovery thereof together with a description thereof showing date of discovery, date of location, and number of feet claimed as aforesaid, and name of the locator thereof to wit, the Uinta Tunnel Mining and Transportation Company, and afterward caused a location certificate thereof to be filed in the office of the clerk & recorder of El Paso county, Colorado, Book 278 at p. — records of the office of said clerk and recorder, and claimed as the location thereof from point of discovery, running 1200 feet southerly and 300 feet northerly from the point of discovery; and that said cross lode is at the present time disclosed and uncovered and appears in the breast of the said tunnel running almost parallel with the course of said tunnel and that under and by virtue of the Revised Statutes of the United States hereinabove referred to and in, under, and by virtue of the terms of sections 2323 and 2336 thereof, this defendant has the right to own, possess, and enjoy said cross lode so by it uncovered and discovered as aforesaid, and to mine, extract, remove, and sell the ores therefrom, and that the said vein so uncovered and disclosed as aforesaid and now appearing at the breast of said tunnel is a well defined gold and silver bearing lode or vein in rock in

place between walls and is valuable for mining and the minerals therein contained.

Seventh. Defendant further answering alleges that the said cross lode by it discovered as aforesaid was never uncovered, disclosed, or discovered by complainant in any workings upon said pretended Ocean Wave and Little Mary lodes, whether done by said complainant or any other person or persons whomsoever.

Eighth. Defendant further alleges and avers that it has and claims the right to own, possess, and operate said lode as of the date, or by virtue of said location of said Uinta tunnel, to wit, of the said 13th day of January, A. D. 1892, as was set forth and claimed in and by virtue of said location certificate thereof, herinbefore described, and by virtue of said notice posted at the mouth of said Uinta tunnel, as hereinabove alleged.

Ninth. Defendant further answering alleges and avers, that the said vein so uncovered and disclosed as aforesaid does not outcrop or appear at the surface nor was the same known to exist at the time of the location of said Uinta tunnel or until the same was discovered by this defendant as it was discovered by it on or about the 18th day of December, A. D. 1897.

Tenth. Defendant further answering alleges and avers that under and by virtue of said discovery it has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine and extract and sell ores and minerals from said vein, over, through, and along said tunnel as the said tunnel entered into along, and across said pretended Ocean Wave and Little Mary lodes, and the defendant claims the right to use the bore of said tunnel by reason of the facts aforesaid as it penetrates said Little Mary lode and across the same as hereinabove stated, and as the said tunnel likewise penetrates through and across the said pretended Ocean Wave lode as hereinabove stated; and that the complainant by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no standing in a court of equity at this time to interfere with defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary Lode mining claims, but on the contrary, complainant by its conduct and actions in the premises, as herein recited and set forth, has permitted and allowed defendant to expend said large sum of money and has permitted and allowed defendant so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lodes, until the same has ripened into such a license and permission to so cross said pretended Ocean Wave and Little Mary lodes, that defendant can not now be disturbed in its use of said tunnel either at law or in equity.

Eleventh. Defendant further answering alleges that at a point distant from the mouth or portal of said tunnel and in and upon the line thereof about 2102 feet, and upon the ground embraced within the surface boundaries of the location of said Uinta Tunnel

location and within the bore thereof, and which location of said tunnel was made long prior to any location made upon said territory by any other person or persons whatever, in driving said tunnel it discovered, uncovered, and disclosed a vein and lode in rock in place bearing gold and silver and other precious metals, on, to wit, the 23rd day of December, A. D. 1897, which said vein was cut crossed, intersected, and penetrated by said tunnel, and said vein so discovered as aforesaid had been segregated from the public domain of the United States, and located and appropriated by said location of said Uinta tunnel and tunnel site and is upon ground that was appropriated by said Uinta Tunnel location long prior to any other location, or attempted or pretended location thereof, and that this defendant located the said vein by calling the same the Uinta Tunnel No. 24, (*loe*) and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof, setting forth and showing the general course of said lode, the number
31 of feet claimed on each side of the said discovery thereof together with a description thereof showing date of discovery, date of location and number of feet claimed as aforesaid, the name of the locator thereof, to wit, the Uinta Tunnel Mining and Transportation Company, and afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278 at page — among the records in the office of said clerk and recorder, and claimed by the location thereof from the point of discovery thereof running northerly 750 feet and southerly 750 feet; and defendant further alleges that said discovery of said Uinta Tunnel No. 24 lode was made on, to wit, the 23rd day of December, A. D. 1897, in full conformity with the laws of the United States and the State of Colorado in reference to such locations, a location certificate thereof being made in duplicate, one of which said certificates was posted in a conspicuous place near the mouth of said tunnel and the other recorded in the office of the clerk and recorder of El Paso county, Colorado as aforesaid on, to wit, the 2nd day of March, A. D. 1898, and defendant further alleges, that the said Uinta Tunnel No. 24 lode and the vein therein discovered as aforesaid, does not outcrop, apex, or appear at the surface of the ground at any point whatever; this defendant further alleges and avers, that it has claimed and has the right to own, possess, operate, and enjoy the said lode as of the date and by virtue of the location of said Uinta Tunnel No. 24 lode, to wit, on the said date of the 13th day of January, A. D. 1892 and so sets forth and claims in and by virtue of the said location certificate thereof, hereinbefore described, and by virtue of the said notice posted at the mouth of the said Uinta Tunnel No. 24 lode, as hereinbefore alleged.

This defendant further alleges that under and by virtue of the said discovery, it has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine, extract, and sell the ores and minerals from said veins, and has the right to remove said ores and minerals by it mined and extracted, through, and along said tunnel where said tunnel enters said pretended Little

Mary lode and across said pretended Little Mary lode as well as along and across said pretended Ocean Wave lode; and the defendant claims the right to use the bore of said tunnel, through and across said pretended Ocean Wave and Little Mary Lode mining claims by reason of the facts aforesaid; and that complainant by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore
32 body, has no standing in a court of equity at this time to interfere with defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lodes and mining claims, but on the contrary complainant by its conduct and actions in the premises, as hereinabove recited and set forth, has permitted and allowed defendant to expend said large sum of money, to wit, the sum of one hundred and thirty-five thousand dollars, and has permitted and allowed defendant to so proceed with said tunnel, through and across the said pretended Ocean Wave and Little Mary lodes and mining claims, until the same has ripened into such a license and permission as entitled the defendant to use its said tunnel as it penetrates the said pretended Ocean Wave and Little Mary lodes; and that said license and permission is such that the defendant can not be disturbed therein, either at law or in equity.

Twelfth. Defendant further alleges that at a point in said tunnel distant from the mouth or portal thereof about 2118 feet and upon ground embraced within the surface boundaries of said Uinta tunnel and within the bore thereof, which location of said tunnel was prior to any other location made on said territory aforesaid defendant in driving and prosecuting said tunnel uncovered and discovered on, to wit, the 6th day of January A. D. 1898, a well defined lode or vein in rock in place carrying gold, silver, and other precious metals, which said vein was cut, crossed, intersected, and penetrated by the said tunnel, and said vein so discovered as aforesaid had been segregated from the public domain of the United States and located and appropriated by the Uinta tunnel location long prior to any other location, or attempted or pretended location thereof, and that this defendant located the said vein by calling the same the Uinta Tunnel No. 25 lode, and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof showing date of discovery, date of location and number of feet claimed as aforesaid, the name of the locator, to wit, the Uinta Tunnel Mining and Transportation Company, and afterwards caused a location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278 at page — among the records in the office of said clerk and recorder, and claimed by the location thereof from the point of discovery thereof, running 750 feet in a northerly direction and 750 feet in a southerly direction, and defendant further al-

leges that said discovery of the said Uinta Tunnel No. 25 lode was had and made on, to wit, the 6th day of January A. D.
33 1897, in full conformity with the laws of the United States and the State of Colorado in reference to such locations; a location certificate thereof being made in duplicate, one of which said certificates was posted in a conspicuous place at the mouth of the said tunnel as aforesaid, and the other thereof recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on, to wit, the 2nd day of March, A. D. 1898, that the Uinta Tunnel No. 25 lode and vein thereof as aforesaid does not outcrop, apex, or appear at the surface or at any other point whatever; and that under and by virtue of the said discovery this defendant has the right to mine, extract, remove, and sell the ores and minerals therefrom, and that said vein uncovered and discovered as aforesaid and known as and called the Uinta Tunnel No. 25 lode is a well defined vein between two walls in rock in place and carrying gold, silver, and other precious metals; and that said lode was never uncovered or discovered by any other person or persons whomsoever; and this defendant alleges that it has claimed and has the right to own, possess, operate, and enjoy said lode as of the date and by virtue of the location of the said Uinta tunnel, to wit, the said date of the 13th day of January, A. D. 1892, and so sets forth and claims in and by virtue of the said location certificate thereof, hereinbefore described, and by virtue of the said notice posted at the mouth of the said Uinta tunnel as hereinbefore alleged; and has the right to remove said ores and minerals, by it mined and extracted from said Uinta Tunnel No. 25 lode, through and along the said tunnel where said tunnel enters the said pretended Little Mary lode, and acros said pretended Little Mary lode as well as along and across said pretended Ocean Wave lode; and this defendant claims the right to use the bore of said tunnel, through and across said pretended Ocean Wave and Little Mary claims by reason of the facts aforesaid and that complainant by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid, in reaching, uncovering and discovering said ore body, has no standing in a court of equity at this time nor right to interfere with this defendant in operating its tunnel over, through, and along the said pretended Ocean Wave and Little Mary Lode mining claims, but on the contrary complainant by its conduct and actions in the premises, hereinabove recited and set forth, has permitted and allowed defendant to expend a large sum of money, to wit, the sum of more than one hundred and thirty-five thousand dollars, and has permitted and allowed defendant to so proceed with said tunnel, through
34 and across said pretended Ocean Wave and Little Mary Lode mining claims, until the same has ripened into a license and permission such as entitle defendant to use its said tunnel as it penetrates the said pretended Ocean Wave and Little Mary lodes; and that said license and permission is such that defendant can not be disturbed therein either at law or in equity.

Thirteenth. Defendant further alleges that at a point in said tunnel

distant from the mouth or portal about 2180 feet and upon ground embraced within the surface boundaries of said tunnel and within the bore thereof, which location of said tunnel was prior to any other location made on said territory this defendant in driving and prosecuting its said tunnel uncovered and discovered on, to wit, the 15th day of December, A. D. 1897, a well defined lode or vein in rock in place carrying gold, silver, and other precious metals, which said vein was cut, crossed, intersected, and penetrated by the said tunnel, and that said vein so discovered as aforesaid had been segregated from the public domain of the United States, and located and appropriated by the said location of the said Uinta tunnel and tunnel site, and is upon ground that was appropriated by the said Uinta tunnel location long prior to any other location or attempted or pretended location thereof; that this defendant located said vein by calling the same the Uinta Tunnel No. 26 lode, and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof, setting forth and showing the general course of the said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof showing the date of discovery, date of location, the number of feet claimed as aforesaid, and the name of the locator, to wit, the Uinta Tunnel Mining and Transportation Company, and afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278 at page — among the records in the office of said clerk and recorder.

Defendant further alleges and avers that it claimed by the location thereof and upon the discovery thereof, 1000 feet running in a northerly direction and 500 feet in a southerly direction; and further alleges that said discovery of said Uinta Tunnel No. 26 lode was had and made on, to wit, the 15th day of December, A. D. 1897, in full conformity with the laws of the United States and the State of Colorado in reference to such locations; a location certificate thereof being made in duplicate, one of which said certificates was posted in a conspicuous place at the mouth of said tunnel as aforesaid and the other thereof recorded in
35 the office of the clerk and recorder of El Paso county, Colorado, as aforesaid on, to wit, the 2nd day of March, A. D. 1898.

Defendant further alleges that said Uinta Tunnel No. 26 lode does not outcrop, apex, or appear at the surface of the ground at any point whatever; that said vein uncovered and discovered as aforesaid and known as and called the Uinta Tunnel No. 26 lode, is a well defined vein between two walls in rock in place carrying gold, silver, and other precious metals; and that said lode was never uncovered or discovered by any other person or persons whomsoever; and that this defendant further claims that it has the right to own, possess, operate, and enjoy said lode as of the date and by virtue of the location of said tunnel, to wit, on the said date of the 13th day of January, A. D. 1892, and by virtue of the said location certificate thereof hereinbefore described, and by virtue of the said notice

posted at the mouth of said tunnel, as hereinabove alleged, and has the right to remove said ores and minerals by it mined and extracted from said Uinta Tunnell No. 26 lode, through and along said tunnel where said tunnel enters said pretended Little Mary lode, and across said Little Mary lode as well as along and across said pretended Ocean Wave lode, and this defendant claims the right to use the bore of said tunnel, through and across said pretended Little Mary and Ocean Wave Lode mining claims by reason of the facts aforesaid, and that complainant by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars as aforesaid, in reaching, uncovering, and discovering said ore body, has no standing in a court of equity at this time to interfere with this defendant in crossing over, through and along said pretended Ocean Wave and Little Mary Lode mining claims, but on the contrary complainant by its conduct and actions in the premises, as hereinabove set forth has permitted and allowed defendant to expend a large sum of money and has permitted and allowed defendant so to proceed with its said tunnel, through and across the said pretended Ocean Wave and Little Mary Lode mining claims, until the same has ripened into a license and permission such as entitles defendant to use its said tunnel as it penetrated the said pretended Ocean Wave and Little Mary lodes; and that said license and permission is such that defendant can not be disturbed therein either at law or in equity.

Fourteenth. Defendant further alleges and avers that after the discovery of said vein known as Uinta Tunnel No. 26 lode, defendant drifted upon the same in a northerly and southerly direction, and that in drifting north on said vein, defendant removed and extracted ore from said vein discovered in said Unita Tunnel
36 No. 26 lode as it had a right to do, which ore so by the defendant discovered of aforesaid was removed and extracted from said Unita Tunnel No. 26 lode during the months of March, April, and February, 1898, and that no action was pretended to have been commenced by the complainant until after the discovery of said ore and the removal thereof by the defendant.

Wherefore, defendant having answered all and singular the matters and things in said bill of complaint contained, respectfully prays:

First. That it be decreed that defendant go hence without day.

Second. That complainant's complaint be dismissed, and that complainant take nothing by its said suit in the premises.

Third. That defendant do have and recover of and from complainant its costs in this behalf expended, and for such other and further relief as to the court shall be deemed just and proper.

SCOTT ASHTON AND
CHARLES J. HUGHES, JR.,
Solicitors for Defendant.

STATE OF COLORADO, } ss:
County of El Paso, }

H. E. Woods being by me first duly sworn on oath deposes and says, that he is the secretary of the Uinta Tunnel Mining and Transportation Company, the above named defendant; that he has read the above and foregoing answer and knows the contents thereof; and that the matters and things therein stated are true according to affiant's best knowledge and belief.

H. E. WOODS.

Subscribed and sworn to before me this 9th day of September, A. D. 1898.

My commission expires Dec. 29th, 1901.

[NOTARIAL SEAL.] WILLIAM D. HATTON,
Notary Public.

Indorsed: 3658. U. S. circuit court. Creede & Cripple M. and M. Co. *vs.* Uinta T. M. and T. Co. Answer to bill. Filed Sep. 19, 1898. Robert Bailey, clerk.

Thirty-fourth Day, November Term, Friday, December 22d, A. D 1899.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the seventh day of November last past.

37 THE CREEDE AND CRIPPLE CREEK Mining and Milling Company *vs.* THE UINTA TUNNEL MINING, AND Transportation Company. } 3658. In Chancery.

Bill for Inspection and Survey and for an Injunction.

This cause coming on now to be heard, C. S. Thomas, Esquire, appearing as solicitor for the complainant, and thereupon on his motion, it is ordered by the court that this cause be and the same is hereby transferred to the law docket of this court, and that the complainant may reform its bill of complaint herein as it shall be advised within twenty (20) days from this day.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

5—219

In the Circuit Court of the United States in and for said District

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company, Plaintiff,
vs.
THE UINTA TUNNEL, MINING, AND TRANSPORTATION Company, Defendant.
} No. 3658.

Amended Complaint.

This cause having been transferred to the law side of the docket by order of court, and leave given plaintiff to reform the complaint the plaintiff, by its attorneys, now comes and files this its amended and reformed complaint, and alleges:

1st. That the plaintiff is a corporation organized under the incorporation laws of the State of Colorado for the purpose of owning and developing mines and mining property, and during all of the times hereinafter mentioned was such corporation duly organized and existing as aforesaid.

2nd. That by virtue of its said articles of incorporation it has been and is fully authorized and empowered to take over, own, possess, and work mines and mining claims in the county of El Paso, State of Colorado, and to do all such other things as might be deemed necessary and expedient in and about the owning and development of said mining property.

3rd. That the defendant is a corporation, as plaintiff is informed and believes, organized under the laws of the State of Iowa, and claims the right to do business within the State of Colorado, by virtue of compliance with the laws of said State concerning foreign corporations.

38 4th. That the plaintiff has, and for more than five years prior to the commencement of this suit was the owner in fee and in possession, except as hereinafter mentioned, and entitled to the possession of all those mines and mining claims situated in the Cripple Creek mining district, county of El Paso, State of Colorado, known as and called the Ocean Wave and Little Mary Lode mining claims, being survey lot No. 8192, (and evidenced by mineral certificate No. 338, the patent of the United States to said plaintiff for said claims bearing date of December 21, A. D. 1893, and duly recorded in the office of the clerk and recorder of said county in Book 173, page 16, of the records thereof). That subsequent to the bringing of this suit, and prior to the order of removal herein, the said county of El Paso has been divided so that the said premises are now situated, lying, and within the county of Teller and State aforesaid.

5th. That the said Little Mary and Ocean Wave Lode mining claims were duly located and discovered on, to wit, the 2nd day of

January, 1892, by J. B. Winchell and E. W. McNeal, and that their said patent relates back to the said date of discovery and location, and takes effect at the said date for all purposes given and provided by the laws of the United States, and the State of Colorado concerning mining claims.

6th. That the said defendant, on the first day of January, 1897, by means of a tunnel driven into and under said mining claims, and each of them, wrongfully and unlawfully, and without the knowledge and consent of the plaintiff, ousted it from the possession of so much of the said premises as have been penetrated by said tunnel, and have retained and still retain possession thereof against the will of the plaintiff.

7th. That the said defendant, by means of and with the said tunnel, has entered as aforesaid into, upon, and underneath the said premises, and has ousted the plaintiff therefrom at a point about 50 feet south of the northwest corner of the Little Mary Lode mining claim, and has proceeded with said tunnel and ouster from said point southeasterly across the said Little Mary Lode mining claim and into, upon, and underneath and across the said Ocean Wave mining claim at a point where said tunnel, pursuing said southeasterly course across the said Little Mary Lode mining claim, would enter into and underneath the said Ocean Wave Lode mining claim, and continues to hold possession of said part of said premises from this plaintiff, and refuses to yield possession thereof, although often requested so to do by the plaintiff, to its damage in the sum of, to wit, five thousand dollars.

39 Plaintiff further alleges that this court has jurisdiction of said parties and the subject-matter hereof by reason of the matters and things set forth in the petition for removal of said cause, because the same involves the construction of section 2323 of the Revised Statutes of the United States in this, that the said defendant claims the right under said section to locate a tunnel underneath, across, and upon previously located mining claims, for the purpose of developing veins therein not previously known to exist, the ownership whereof it contends belongs upon discovery and location to such discoverer and locator; and also claims the right under said section to locate a tunnel across previously located mining claims for the development or discovery of mines located or to be located beyond said previously located mining claims by means of said tunnel, and upon the unappropriated mineral domain of the United States, whereas, the plaintiff claims that no such rights are given, either directly or by implication by said section.

Plaintiff also alleges that the amount and value of the property in controversy exceeds, exclusive of interest, the sum of two thousand dollars.

Wherefore, plaintiff prays judgment against the defendant:

1st. For the recovery of the possession of the said premises hereinbefore described.

2nd. For five thousand dollars damages.

3rd. For costs of suit.

A. T. GUNNELL AND
THOMAS, BRYANT AND LEE,
Attorneys for Plaintiff.

Indorsed: No. 3658. The Creede & Cripple Creek M. & M. Co. *vs.* The Uinta Tunnel M. & T. Company. Amended complaint. Filed Jan. 4, 1900. Robert Bailey, clerk. A. T. Gunnell, Thomas, Bryant, and Lee, attorneys for plaintiff.

47th Day, Wednesday, January 10th, A. D. 1900.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the seventh day of November last past.

THE CREEDE & CRIPPLE CREEK MINING AND MILLING Company
vs.
THE UINTA TUNNEL*ing* MINING AND TRANSPORTATION Company. } 3658.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by W. H. Bryant, Esquire, its attorney and thereupon on his motion,

It is ordered by the court that the defendant answer the amended complaint herein within thirty (30) days from this day.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss*:

In the Circuit Court of the United States within and for the District of Colorado.

THE CREEDE AND CRIPPLE CREEK MINING AND Milling Company, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION Company, Defendant. } No. 3658. Law.

Answer.

Now comes the defendant, and answering the plaintiff's complaint heretofore filed herein, says that:

First. It admits that the plaintiff is and was a corporation organized and existing under the laws of the State of Colorado, for the purpose of owning and developing mines and mining property as in said complaint alleged.

Second. It admits that the plaintiff, by virtue of its articles of incorporation, is authorized to take over, own, possess, and work mines and mining claims as in said complaint alleged.

Third. It admits that the defendant is a corporation organized and existing under the laws of the State of Iowa, and has the right to do and is doing business within the State of Colorado, by virtue of a full compliance with the laws of said State concerning foreign corporations.

Fourth. It denies that the plaintiff is now, for more than five years prior to the commencement of this action was, or that it ever was the owner in fee of the pretended Ocean Wave and Little Mary Lode mining claims, but it admits, upon information and belief, that the plaintiff, by some means, obtained an alleged patent for said claims,

which patent the defendant alleges was not obtained or issued in pursuance of the statutes of the United States which provides for the issuance of patents, and that such patent is and should be wholly null and void. It further alleges that said Ocean Wave and Little Mary Lode mining claims were not, nor were either of them, located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered or uncovered in the discovery shaft of said Ocean Wave Lode mining claim or of said Little Mary Lode mining claim.

1901, Dec. 6. Motion to strike granted.

It further denies that the plaintiff for more than five years
41 prior to the beginning of this action, or that it ever was in possession or entitled to the possession of said lode mining claims, or either of them.

Fifth. It denies that said Little Mary and said Ocean Wave Lode mining claims, or either of them, were discovered or located, at any time by J. B. Winchel and E. W. M. McNeal, or by either of them, or by any person;

and denies that said patent relates back to or takes effect from the date of said alleged discovery and location for all purposes or for any purpose given or provided by the laws of the United States or of the State of Colorado concerning mining claims; but it alleges that there never was, at any time or by any person, any location whatever made of said pretended Ocean Wave Lode mining claim or of said Little Mary Lode mining claim.

1901, Dec. 6. Motion to strike granted.

Sixth. It denies that at any time by means of a tunnel driven into and under said alleged mining claims, or either of them this defendant wrongfully or unlawfully ousted the plaintiff from the possession of so much of said premises as has been penetrated by said alleged tunnel, or that it did so without the knowledge or consent of the plaintiff;

1901, Dec. 6. Motion to strike granted.

but the defendant alleges that the plaintiff and its officers and particularly its directors and those in the possession, control, and management of the workings of said alleged lode mining claims, for more than a year last prior to the beginning of this action, have had full knowledge that the defendant was driving its said tunnel into, through, and across said pretended Ocean Wave and Little Mary Lode mining claims, and that the same was so driven into, through, and across said alleged lode mining claims with the knowledge and consent of the plaintiff and of the persons who were in possession of, and who were working and developing said alleged lode mining claims. The defendant further denies that it wrongfully or unlawfully retains possession of any part or portion of either of said alleged lode mining claims.

Seventh. It denies that by means of or with said tunnel the defendant has entered into, upon, and underneath said alleged premises and ousted the plaintiff therefrom at the point in said complaint alleged or at all.

Eighth. It admits that the amount and value of the property in controversy exceeds, exclusive of interest, the sum of two thousand dollars.

Ninth. The defendant further answering, and as a further defense to the plaintiff's complaint, alleges that it is a corporation organized and existing under and by virtue of the laws of the State
42 of Iowa, and a citizen of said State doing business in the State of Colorado, by virtue of a full compliance with the laws of said State concerning foreign corporations; that it was organized for the purpose, among other things of owning, operating, and developing lodes and lode mining claims in the then county of El Paso, now county of Teller, and State of Colorado; and that it now is and during all the times hereinafter mentioned was the owner by itself and its grantors, and in possession of the Uinta tunnel and tunnel site location and of all the rights and privileges thereunto belonging and appertaining.

Tenth. It alleges that said Uinta tunnel and tunnel site location was made by William E. Hall, W. R. Mason, and Herman Tieje on the thirteenth day of January, 1892, that said Hall, Mason, and Tieje were at the time of the location thereof, citizens of the United States, and over the age of twenty-one years; that they entered upon the unoccupied public mineral domain of the United States and located said Uinta tunnel and tunnel site, by placing at the face thereof a plain sign or notice, containing the name of the Uinta tunnel, the course and distance thereof, the date of the location, the general course thereof, and the name of said locators above named; that, in addition thereto, they placed at the face of said tunnel a written notice describing said Uinta tunnel by metes and bounds, and giving the course thereof; and that they afterwards marked the same upon the surface, and the same was designated upon the ground by a line run through the trees and underbrush upon said mountain, and by stakes set at intervals along said line duly marked with the name of said tunnel site, so that the same could be easily designated upon the ground by a line run through the trees and underbrush upon said mountain, and by stakes set at intervals along said line duly marked with the name of said tunnel site, so that the same could be easily designated upon the ground and along the surface thereof.

Eleventh. It alleges that said Uinta tunnel and tunnel site location was made under and in compliance with the provisions of section 2323 of the Revised Statutes of the United States, and the rules and regulations adopted by the Department of the Interior of the United States thereunder, and was located on the thirteenth day of January, 1892, as will appear from the location certificate thereof, which fully appears in and by the records of the county of El Paso, where the same is duly and at length recorded in Book 79, at page 492 of the records of said county, and that the defendant by divers mesne conveyances, acquired said Uinta tunnel and tunnel site location, and all the rights,
43 properties, and possessions thereunto appertaining and belonging, on or about the sixteenth day of May, 1896, and has ever since said time been the owner thereof, together with all the rights belonging thereto.

Twelfth. It alleges that prior to the acquisition by it of the title of said tunnel, work had been diligently prosecuted thereon from the time of its location up to the time of the aforesaid purchase thereof by this defendant, and that the same was prosecuted in full compliance with the provisions of section 2323 of the Revised Statutes of the United States; that at no time was work abandoned, neglected, or discontinued for any successive period of six months, but that the same was prosecuted with due diligence at all times prior to

1901, Dec. 6. Motion to strike granted.

the purchase thereof by this defendant; that, from the time of its said purchase, the defendant has prosecuted the work therein and thereon with great diligence for the purpose of boring said tunnel, and also for the discovery of veins therein and in the manner and to the extent provided for under section 2323 of the Revised Statutes of the United States; and that at no time since the defendant has been the owner thereof has work been discontinued for a period of six consecutive months.

Thirteenth. It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars ($125,000.00), and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars ($10,000.00).

Fourteenth. It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location under and by virtue of the laws of the United States, and under the provisions of section 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of and in reliance upon said statute.

1901, Dec. 6. Motion to strike granted.

Fifteenth. It alleges that said Uinta tunnel entered the westerly side lines of the pretended Little Mary Lode mining claim at a point distant from the mouth or portal of said tunnel about 550 feet more than one year prior to the commencement of the above entitled action; that said tunnel was driven through said pretended Little Mary Lode mining claim with great diligence, and was driven on its course through the side lines of said pretended Ocean Wave
44 Lode mining claim, and when said tunnel had been driven through said pretended Ocean Wave and Little Mary Lode mining claims, it was distant from the mouth or portal thereof about 1175 feet; that in running said tunnel through said pretended Ocean Wave and Little Mary lode and lode mining claims, the defendant drove the same a distance of about six hundred and twenty-five feet; that the same was driven through said pretended Ocean Wave and Little Mary Lode mining claims, with the full knowledge and consent of the plaintiff at the great cost and expense as above set forth; that said tunnel was so driven through said pretended lode mining claims more than a year prior to the commencement of the above entitled action, without any protest or objection made by the plaintiff or its officers, employees or agents; but that the driving of said tunnel was acquiesced in by the plaintiff, its officers, servants, and em-

ployees; and that after driving said tunnel through and across said pretended Ocean Wave and Little Mary Lode mining claims, the defendant continued the prosecution of its said tunnel and drove the same to a distance of about twenty-two hundred feet and until it reached and penetrated the territory that is claimed by the Portland Gold Mining Company, and it was after said tunnel had reached said distance that the plaintiff instituted the above entitled action, and the same was then instituted by the plaintiff because, for the reason, and on account of the matters and things hereinafter recited and set forth.

Sixteenth. Further answering, it alleges that, at a point distant from the mouth or portal of said tunnel and in and upon the line thereof about nineteen hundred and thirty-one feet, and upon the ground embraced within the surface boundaries of the location of said tunnel and within the location of the bore thereof, which location of said tunnel was made long prior to any location upon said territory by any other person or persons, the defendant, in driving its said tunnel, discovered, uncovered, and disclosed a vein and lode in rock in place, bearing gold, silver, and other precious metals, which said vein entered said tunnel and was parallel to the line of said tunnel, for a distance of more than five hundred feet, and is still within said tunnel and within the breast thereof; that the same is now on the line and bore thereof near the south line of said tunnel; that said tunnel is at present driven into the mountain for a distance slightly exceeding twenty-two hundred feet, and is through and beyond the easterly side line of said pretended Ocean Wave Lode mining claim about eleven hundred feet; that said vein is intersected, uncovered, and discovered in said tunnel as above set forth, and is described as the Uinta Tunnel No. 23 lode, and is a cross lode to any lode ever uncovered and discovered in said territory by any person or persons; and that the same was never uncovered or discovered by any person or persons until the same was discovered and cut as aforesaid by said Uinta tunnel.

1901, Dec. 6. Motion to strike granted.

Seventeenth. It alleges that, in driving said tunnel, it has followed said cross lode by it discovered as aforesaid upon territory which was segregated and marked, and upon ground appropriated by said tunnel location parallel in location thereto, as it had full right and authority to do in virtue and by right of section 2336 Revised Statutes of the United States; that it located said cross lode by calling it Uinta Tunnel No. 23 lode and mining claim, and by placing at the mouth of said tunnel in a conspicuous place a location certificate showing the general course of said lode and the number of feet claimed on each side of the discovery thereof, together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as

1901, Dec. 6. Motion to strike granted.

aforesaid, and the name of the locator thereof, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused a location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page —, records of said clerk and recorder, and claimed by the location thereof from point of discovery thereof running twelve hundred feet southerly and three hundred feet northerly; that said cross lode is at the present time disclosed and uncovered and appears in the breast of said tunnel running almost parallel with the course of said tunnel; that under and by virtue of the Revised Statutes of the United States hereinabove referred to, and in, under, and by virtue of the terms of section 2336 thereof, this defendant has the right to own, possess, and enjoy said cross lode so by it uncovered and discovered as aforesaid, and to mine, extract, remove, and sell the ores therefrom; and that said vein so uncovered and disclosed as aforesaid and now appearing at the breast of said tunnel is a well defined gold and silver bearing lode, or vein in rock in place between the walls of rock and is valuable for mining and for the minerals therein contained; that said cross lode by it discovered as aforesaid was never uncovered, disclosed, or discovered by the plaintiff in any workings upon said pretended Ocean Wave and Little Mary Lode mining claims, whether done by said plaintiff or any other person or persons whomsoever that the defendant has claimed and still claims the right to own, possess, and operate said lode as of the date or by virtue of said location of said Uinta tunnel, to wit, of the thirteenth day of January, A. D. 1892, as was set forth and claimed in and by virtue of said location certificate thereof, hereinbefore described and by
46 virtue of said notice posted at the mouth of said Uinta tunnel, as hereinbefore alleged; that said vein so uncovered and disclosed as aforesaid does not outcrop or appear at the surface, nor was the same known to exist at the time of the location of said Uinta tunnel, or until the same was discovered by this defendant, as it was discovered by it on or about the eighteenth day of December, A. D. 1897; that the defendant under and by virtue of said discovery has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine, extract, and sell ores and minerals from said vein over, through and along said tunnel as said tunnel entered along, and across said pretended Ocean Wave and Little Mary Lode mining claims; that the defendant claims the right to use the bore of said tunnel by reason of the facts aforesaid as it penetrates said Little Mary lode and lode mining claim and across the same as hereinabove stated, and as said tunnel likewise penetrates through and across said pretended Ocean Wave lode and lode mining claim as hereinabove stated;

that the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with this defendant in operating its tunnel over, through and along said pretended Ocean Wave and Little Mary lode and lode mining claims; but, on the contrary the plai-tiff by its conduct and actions in the premises, as hereinbefore recited and set forth, has permitted and allowed this defendant to expend said large sum of money, and has permitted and allowed it so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lode and lode mining claims, until the same has ripened into such a license and permission to so cross said pretended Ocean Wave and Little Mary lode and lode mining claims that the defendant can not now be disturbed in its use of said tunnel.

Eighteenth. It alleges that at a point distant from the mouth or portal of said tunnel, and in and upon the line thereof two thousand one hundred and two feet, upon the ground embraced within the surface boundaries of the location of said Uinta Tun-el location, and within the face thereof, which location of said tunnel was made long prior to any location upon said territory by any other person or persons whatever; that in driving said tunnel this defendant discovered, uncovered, and disclosed a vein and lode in rock in place, which carries gold, silver, and other precious metals on the twenty-third day of December, A. D. 1897, which said vein was cut, crossed, intersected, and penetrated by said tunnel, and said vein so discovered as aforesaid had been segregated from the public
47 domain of the United States, and located and appropriated by said Uinta tunnel and tunnel site, and is upon ground that was appropriated by said Uinta Tunnel location long prior to any other location, or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 24 lode and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof, setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator thereof, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278 at page — among the records in the office of said clerk and recorder, and claimed by the location thereof from the point of discovery thereof running northerly seven hundred and fifty feet and southerly seven hundred

1901, Dec. 6. Motion to strike granted.

and fifty feet; that said discovery of said Uinta Tunnel No. 24 lode was made on the twenty-third day of December, A. D. 1897, in full conformity with the laws of the United States and of the State of Colorado in reference to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place near the mouth of said tunnel, and the other recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 24 lode and the vein therein discovered as aforesaid does not outcrop, apex, or appear on the surface of the ground at any point whatever; and that this defendant has claimed and has the right to own, possess, operate, and enjoy said lode as of the date and by virtue of the location of said Uinta Tunnel No. 24 lode, to wit, on the thirteenth day of January, A. D. 1892, and so sets forth and claims in and by virtue of said location certificate thereof hereinbefore described and by virtue of said notice posted at the mouth of said Uinta Tunnel No. 24 lode, as hereinbefore alleged; that, under and by virtue of said discovery it has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine, extract, and sell the ores and minerals from said vein, and has the right to remove said ores and minerals by it mined and extracted through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim, and across said pretended Little Mary lode and lode mining claim, as well as across and along said pretended Ocean Wave lode and lode mining claim; that the defendant claims the right to use the bore of said tunnel through and across said pretended Ocean Wave
48 and Little Mary Lode mining claims by reason of the facts aforesaid, and that the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through and along said pretended Ocean Wave and Little Mary lode- and lode mining claims, but that, on the contrary the plaintiff by its conduct and actions in the premises as hereinabove recited and set forth has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars ($135,000) and has permitted and allowed the defendant to so proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lode- and lode mining claims until the same has ripened into such a license and permission as entitles the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lode- and lode mining claims, and that said license and permission is such that the defendant can not be disturbed therein.

1901, Dec. 6. Motion to strike granted.

Nineteenth. It alleges that at a point in said tunnel from the mouth or portal thereof about two thousand one hundred and eighteen feet, upon ground embraced within the surface boundaries of said Uinta tunnel and within the bore thereof, which location of said tunnel was prior to any other location made on said territory aforesaid, the defendant, in driving and prosecuting said tunnel, uncovered, and discovered, on the sixth day of January, A. D. 1898, a well defined lode or vein in rock in place, which carried gold, silver, and other precious metals, which said vein was cut, crossed, intersected, and penetrated by said tunnel; that said vein so discovered as aforesaid has been segregated from the public domain of the United States, and located and appropriated by the Uinta Tunnel location long prior to any location or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 25 lode, and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof, showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused a location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — among the records in the office of said clerk and recorder
49 and claimed by the location thereof from the point of discovery thereof, running seven hundred and fifty feet in a northerly direction and seven hundred and fifty feet in a southerly direction; that said discovery of said Uinta Tunnel No. 25 lode was had and made on the sixth day of January, A. D. 1898, in full conformity with the laws of the United States, and of the State of Colorado, in reference to such locations; that a location certificate thereof was made in duplicate one of which certificates was posted in a conspicuous place at the mouth of said tunnel as aforesaid, and the other thereof recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 25 lode and vein thereof as aforesaid does not outcrop, apex, or appear at the surface or at any other point whatever; that under and by virtue of said discovery, this defendant has the right to mine, extract, remove, and sell the ores and minerals therefrom; that said vein uncovered and discovered as aforesaid and known as and called Uinta Tunnel No. 25 lode, is a well defined vein between two walls *in* rock in place and carries gold, silver, and other precious metals; that said lode was never uncovered or discovered by the plaintiff or any other person or persons whomsoever; and that this

1901, Dec. 6. Motion to strike granted.

defendant has claimed and has the right to own, possess, operate, and enjoy said lode as of the date by virtue of the location of said Uinta tunnel, to wit, the thirteenth day of January, A. D. 1892, and so sets forth and claims in and by virtue of said location certificate thereof, hereinbefore described and by virtue of said notice posted at the mouth of said Uinta tunnel and hereinbefore alleged; that it has the right to remove said ores and minerals, by it mined and extracted from said Uinta Tunnel No. 25 lode, through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim, and across said pretended Little Mary lode and lode mining claim, as well as along and across said pretended Ocean Wave lode and lode mining claim; that it claims the right to use the bore of said tunnel, through and across said pretended Ocean Wave and Little Mary lode- and lode mining claims by reason of the facts aforesaid; that the plaintiff by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body has no right to interfere with this defendant in operating its tunnel, over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims; but, on the contrary, the plaintiff, by its conduct and actions in the premises hereinabove recited and set forth has permitted and allowed the defendant to expend the sum of more than one hundred and thirty-five thousand dollars ($135,000) and has permitted and allowed the defendant to so proceed with said tunnel, through and across said pretended Ocean Wave and Little Mary Lode mining claims until the same has ripened into such a license and permission as entitles the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lode- and lode mining claims; and that said license and permission is such that the defendant can not be disturbed therein.

1901, Dec. 6. Motion to strike granted.

Twentieth. It alleges that, at a point in said tunnel distant from the mouth or portal about two thousand one hundred and eighty feet, upon ground embraced within the surface boundaries of said tunnel and within the bore thereof, which location of said tunnel was prior to any other location made on said territory, this defendant in driving and prosecuting its said tunnel, uncovered and discovered on the fifteenth day of December, A. D. 1897, a well defined lode or vein in rock in place, which carries, gold, silver, and other precious metals, which said vein was cut, crossed, intersected and penetrated by said tunnel; that said vein so discovered as aforesaid had been segregated from the public domain of the United States, and located and appropriated by said location of said Uinta tunnel and tunnel site, and is upon ground that was appropriated by said Uinta Tunnel location

long prior to any other location or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 26 lode and placed and erected at the mouth of said tunnel in a conspicuous place, a location certificate or notice thereof, setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof, showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — among the records in the office of said clerk and recorder; that it claimed by the location thereof and upon the discovery thereof one thousand feet running in a northerly direction and five hundred feet in a southerly direction from the point of discovery thereof; that said discovery of said Uinta Tunnel No. 26 lode was had and made on the fifteenth day of December, A. D. 1897, in full conformity with the laws of the United States and of the State of Colorado in reference to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place at the mouth of said tunnel as aforesaid, and the other thereof
51 recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 26 lode does not outcrop, apex, or appear at the surface of the ground at any point whatever; that said vein uncovered and discovered as aforesaid, and known as and called Uinta Tunnel No. 26 lode, is a well defined vein between two walls of rock in place, and carries gold, silver, and other precious metals; that said lode was never uncovered or discovered by the plaintiff or any other person or persons whomsoever; that this defendant further claims that it has the right to own, possess, operate, and enjoy said lode as of the date and by virtue of the location of said tunnel to wit, on the thirteenth day of January, A. D. 1892, that by virtue of said location certificate thereof hereinbefore described, and by virtue of said notice posted at the mouth of said tunnel as hereinbefore alleged, it has the right to remove said ores and minerals by it mined and extracted from said Uinta Tunnel No. 26 lode, through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim and across said Little Mary lode and lode mining claim, as well as along and across said pretended Ocean Wave lode and lode mining claim; that this defendant claims the right to use the bore — said tunnel, through and across said pretended Little Mary and Ocean Wave lode and lode mining claims

1901, Dec. 6. Motion to strike granted.

by reason of the facts aforesaid; that the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid, in reaching, uncovering, and discovering said ore body, has no right to interfere with this defendant in crossing over, through, and along said pretended Ocean Wave and Little Mary lode-and lode mining claims; but on the contrary the plaintiff by its conduct and actions in the premises as hereinbefore set forth, has permitted and allowed the defendant to expend said large sum of money, and has permitted and allowed the defendant to so proceed with its said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims, until the same has ripened into a license and permission such as entitles the defendant to use its said tunnel as it penetrated said pretended Ocean Wave and Little Mary lodes and lode mining claims; and that said license and permission is such that the defendant can not be disturbed therein.

1901, Dec. 6. Motion to strike granted.

Twenty-first. It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the act of Congress in reference to tunnel rights and subject to the laws of the State of Colorado in reference to the right to run tunnels through ground that may be patented, for the purpose
52 of reaching territory that belong- to tunnel owners beyond such patented claims, and subject to the rights which the defendant The Uinta Tunnel Mining and Transportation Company and its grantors, had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims, that it might cut or discover in driving said tunnel as is guaranteed to the locator of said tunnel under and by virtue of section 2323 of the Revised Statutes of the United States; that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of the United States and of the State of Colorado which authorize and provide for the location and prosecution of such tunnels and which defines and determines the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary Lode mining claims so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel,

located in accordance with section 2323 of the Revised Statutes of the United States and also subject to the rights of this defendant to cross said claims and to drive drifts therein and to follow said lode claims as located by this defendant and to reach lode claims so owned by this defendant, as hereinbefore and hereinafter stated.

Twenty-second. It avers that from about twenty-two hundred and fifty feet from the mouth or portal of said Uinta tunnel, said tunnel run- along, through, and across the Black Jasper lode; that on the thirteenth day of January, A. D. 1897, Vance Carothers, who was then and there a citizen of the United States over the age of twenty-one years, entered upon the unoccupied public mineral domain of the United States and located what is known as said Black Jasper Lode mining claim; that the same was marked by six substantial posts, one at each corner and one at the center of each side line thereof, which posts were hewed and marked on the sides in towards the claim; that a discovery shaft was sunk thereon to a depth of more than ten feet from the lowest point to the rim thereof at the surface, which disclosed a well defined vein which carried gold and other precious metals therein; that at the point of said discovery the locator placed a plain sign or notice con-
53 taining the name of the lode, the date of the discovery, the name of the locator, and the general course thereof; that afterwards, on the second day of February, A. D. 1897, said Vance Carothers caused a location certificate to be made of said Black Jasper lode, which contained the name of the lode, the name of the locator, the date of the location, and described the same by metes and bounds, that said location certificate was afterwards on the second day of February, A. D. 1897, duly recorded in the office of the clerk and recorder of El Paso county, Colorado; that this defendant by mesne conveyances from the locator and owner of said Black Jasper Lode mining claim, became the owner thereof and is now such owner; that said tunnel enters said Black Jasper lode as aforesaid at about twenty-two hundred and fifty feet from the mouth or portal thereof, and continues along and through said Black Jasper lode as located to the breast thereof; that this defendant has the right, under the laws of the State of Colorado and the acts of Congress to enter through and along said Ocean Wave and Little Mary lodes and lode mining claims for the purpose of reaching the lode claims owned by this defendant beyond the mouth or portal of said tunnel, and beyond said Ocean Wave and Little Mary lodes and lode mining claims; that said Ocean Wave and Little Mary lodes and lode mining claims lie between the mouth or portal of said tunnel and said Black Jasper Lode mining claim and between said Uinta Tunnel No. 23 lode and mining claim and said Uinta Tunnel No. 24 lode and mining claim and

1901, Dec. 6. Motion to strike granted.

said Uinta Tunnel No. 25 lode, and mining claim and said Uinta Tunnel No. 26 lode and mining claim, from which said last lode and mining claim this defendant has been shipping rich and valuable ore; that by reason of the ownership of said lode and mining claims last above described and by virtue of the laws of the State of Colorado and the acts of Congress, this defendant has the right to cross through and beyond said Ocean Wave and Little Mary lodes and lode mining claims for the purpose of reaching said lode mining claims which are owned by and which belong to this defendant.

Wherefore, the defendant prays judgment against the plaintiff that it may have the right to use and operate its said tunnel through said pretended Ocean Wave and Little Mary lodes and lode mining claims as said tunnel is now constructed and operated.

Second. For judgment declaring that the defendant has the right to mine and extract ore by it uncovered and discovered in said Uinta Tunnel No. 23, lode, Uinta Tunnel No. 24 lode, Uinta Tunnel No. 25 lode, and Uinta Tunnel No. 26 lode, and to haul the
54 same through its said tunnel, through, across, and along said Ocean Wave and Little Mary lodes and lode mining claims, as the same are now penetrated by said tunnel.

Third. For its costs of suit in this behalf expended or incurred.

CHAS. J. HUGHES, JR.,
SCOTT ASHTON,
Attorneys for the Defendant.

STATE OF COLORADO, } ss:
County of Teller, }

H. E. Woods, being duly sworn, on oath deposes and says that he is the secretary of The Uinta Tunnel, Mining and Transportation Company, the above named defendant; that he has read the above and foreging answer and knows the contents thereof, and that the matters and things therein stated are true according to affiant's best knowledge and belief.

H. E. WOODS.

Subscribed and sworn to before me this ninth day of February, A. D. 1900.

My commission as a notary public will expire April 14th, 1903.

[NOTARIAL SEAL.] WILLIAM D. HATTON,
Notary Public.

Indorsed: No. 3658, div. — law. In the U. S. circuit court. The Creede & Cripple Creek M. & M. Co., plaintiff, *vs.* The Uinta Tunnel M. & T. Co., defendant. Answer to complaint. Filed Feb. 10, 1900.

Robert Bailey, clerk. Chas. J. Hughes, Jr., and Scott Ashton, attorneys for the defendant.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States within and for said District.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Plaintiff,
vs.
THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Defendant.

The plaintiff now comes and demurs to the following parts of the answer of the above named defendant:

First. To that part of the fourth paragraph thereof commencing with the words "which patent" in the fourth line of the second page, and ending with the words "Little Mary Lode mining claim" in the twelfth line of the said second page, because the same is immaterial, redundant and insufficient as an answer to the complaint or any part thereof.

55 Second. It demurs to all that part of the fifth paragraph beginning with the words "and denies" on the nineteenth line of the second *second* page of said answer, and ending with the word "claim" in the next to the last line of said page, because the same is irrelevant and insufficient as an answer to the complaint in said cause.

Third. It demurs to so much of the sixth paragraph of said answer which begins with the words "But the defendant alleges" in the fifth line of the third page of said answer, down to the end thereof, because the same does not state facts constituting a sufficient answer to the complaint in said cause.

Fourth. Plaintiff demurs to the tenth, eleventh, twelfth, thirteenth and fourteenth paragraphs of said answer because the same do not state facts sufficient to constitute an answer to said contract.

Fifth. Plaintiff demurs to that part of the fifteenth paragraph of said answer commencing with the words "that said tunnel" in the third line from the bottom of page six, to the end of said paragraph, because the same does not state facts sufficient to constitute any answer to the plaintiff's complaint.

Sixth. The plaintiff demurs to the sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second paragraphs of said complaint, because the same and each and every part thereof is wholly insufficient and states no facts in any manner sufficient to constitute an answer or defense to the complaint in said cause.

Wherefore plaintiff prays judgment upon its said demurrer as to all and singular said parts of said answer herein demurred to as aforesaid.

THOMAS, BRYANT, AND LEE,
Attorneys for Plaintiff.

Indorsed: 3658. U. S. circuit court, district of Colorado. The Creede and Cripple Creek Mining and Milling Company *vs.* The Uinta Tunnel Mining and Transportation Company. Demurrer to answer. Filed Feb'y 28, 1900. Robert Bailey, clerk. Thomas, Bryant and Lee, plaintiff's attorneys.

First Day, May Term, Tuesday, May 7th, A. D. 1901.

Pleas in the United States circuit court for the district of Colorado, at a term thereof begun and held at the United States court house at Denver on the first Tuesday (it being the seventh day) of May, in the year of our Lord one thousand nine hundred and one.

56 Present: The Honorable Moses Hallett, district judge, Earl M. Cranston, Esquire, district attorney. Dewey C. Bailey, Esquire, marshal. Robert Bailey, Esquire, clerk.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company *vs.* THE UINTA TUNNEL MINING AND TRANSPORTATION Company. } 3658.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by Thomas R. Woodrow, and thereupon on its motion, it is ordered by the court that plaintiff's attorney may withdraw permanently from the files of the court in this cause, the patent for the Ocean Wave and Little Mary Lode mining claims upon leaving a receipt therefor with the clerk of the court.

32nd Day, Saturday, June 22d, A. D. 1901.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the seventh day of May last past.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company *vs.* THE UINTA TUNNEL MINING AND TRANSPORTATION Company. } 3658.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by H. H. Lee, Esquire, its attorney, and the defendant by C. J. Hughes, Jr., Esquire, its attorney also comes.

And the demurrer to the answer herein coming on now to be heard is argued by counsel, and thereupon the court declines to proceed further with this cause until the pleadings herein shall be put in proper form.

Thirty-sixth Day, May Term, Thursday, June 27th, A. D. 1901.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado, and other officers as noted on the seventh day of May last past.

And before the Honorable Moses Hallett, district judge, the following proceedings were had:

57 THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY. } 3658.

Action for possession of specific real property and for damages.

At this day comes H. H. Lee, Esquire, attorney for the plaintiff, no one appearing for the defendant. And the motion to strike out parts of the answer herein coming on now to be heard is submitted to the court, and thereupon it is ordered by the court that the defendant file herein a brief on said motion within eight (8) days from this day.

Twenty-second Day, November Term, Friday, December 6th, A. D. 1901.

Present: The Honorable Moses Hallett, district judge and other officers as noted on the 5th day of November last past.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY. } 3658.

Action for possession of specific real property and for damages.

The motion to strike from the answer of the defendant certain portions thereof having heretofore come on to be heard and having been argued by counsel, H. H. Lee, Esquire appearing as attorney for the plaintiff, and C. J. Hughes, Jr., Esquire, appearing as attor-

ney for the defendant, and having been taken under advisement and the court having considered the same and being now fully advised in the premises.

It is ordered by the court for good and sufficient reasons to the court appearing that said motion be and the same is hereby granted, and that all those portions of the answer commencing with the words "which patent" in the fourth line of the second page, and ending with the words "Little Mary Lode mining claim" in the twelfth line of the same page; and all that part of the fifth paragraph commencing with the words "and denies" in the fourth line thereof, and ending with the word "claim" at the conclusion of said paragraph. All that part of the sixth paragraph of said answer which begins with the words "but the defendant alleges" in the sixth line of said paragraph down to the end thereof. All of the tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first
58 and twenty-second paragraphs of said answer be and the same are hereby stricken from the answer to the amended complaint herein.

Fifty-fifth Day, November Term, Wednesday, January 29, A. D. 1902.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado, and other officers as noted on the 5th day of November last past.

And before the Honorable John A. Riner, district judge, of the district of Wyoming assigned to the district of Colorado, the following proceedings were had.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY. } 3658.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by Harry H. Lee, Esquire, its attorney, and the defendant by Scott Ashton, Esquire, its attorneys also comes. And thereupon comes a jury, to wit:

Isadore S. Frank.	A. F. Roberts,
Thomas W. Rayburn,	George Tuck,
George F. Roberts,	William Wise,
Frederick O. Vaile,	W. C. Carnagie,
George W. Vallery,	E. C. Evans,
Edward Wilson,	I. Van Kuren.

Twelve good and lawful men and they are duly selected and tried,

empanelled and sworn to well and truly try the issues herein joined, and a true verdict render according to the evidence. And thereupon comes the evidence. And the said jurors having heard the evidence produced herein and being thereto duly instructed by the court upon their oaths do say that they find the issues herein joined for the plaintiff, and that it is the owner and entitled to the possession of the premises in its complaint set forth and described.

Wherefore, it is considered by the court that the plaintiff do have and recover of and from the defendant, possession of the premises, lands, and tenements in its amended complaint herein set forth and described, to wit, the Ocean Wave and Little Mary Lode mining claims, being survey lot No. 8192, situated in the Cripple Creek mining district, Teller county, Colorado, and that it have a writ of possession therefor.

59 It is further considered by the court that the plaintiff do have and recover of and from the defendant its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

WEDNESDAY, *January 29th*, 1902.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY. } 3658.

Action for possession of specific real property and for damages.

On this 29th day of January, A. D. 1902, the same being one of the regular juridical days of the November, A. D. 1901, term of this court, there being present the Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado,

It is considered by the court that the plaintiff do have and recover of and from the defendant possession of the premises, lands, and tenements in its amended complaint set forth and described as follows, to wit: The Ocean Wave and Little Mary Lode mining claims, situate in California mining district, Lake county, Colorado, being survey lot No. 8192, and evidenced by mineral certificate No. 338, the patent of the United States to said plaintiff for said claims bearing date of December 21, A. D. 1893, and duly recorded in the office of the clerk and recorder of said county in Book 173, page 16, of the records thereof, and that it have a writ of possession therefor.

It is further considered by the court that the plaintiff do have and recover of and from the defendant its costs by it in this behalf laid out and have execution therefor.

73rd Day, Tuesday, March 4th, A. D. 1902.

Present: The Honorable Moses Hallett, district judge, and the

Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado, and other officers as noted on the 5th day of November last past.

And before the Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado the following proceedings were had:

60 THE CREEDE AND CRIPPLE CREEK MINING AND Milling Company
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION Company. } 3658.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by H. H. Lee, Esquire, its attorney, and the defendant by Scott Ashton, Esquire, its attorney also comes.

And the motion for a new trial of the issues herein joined coming on now to be heard is submitted to the court, without argument. And the court having considered the same and being now fully advised in the premises.

It is ordered by the court, for good and sufficient reasons to the court appearing that said motion be and the same is hereby overruled.

And thereupon on motion of the defendant, it is ordered by the court that the defendant have day and to and including thirty (30) days from this day within which time to file herein a bill of exceptions reserved by it upon the trial of the issues herein joined, and cost bond on writ of error shall be in the sum of three hundred dollars ($300).

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLing Company, Plaintiff,
vs.
THE UINTA TUNNEL, MINING, AND TRANSPORTATION Company, Defendant. } 3658. Law.

Bill of Exceptions.

Be it remembered, that, on the tenth day of February, A. D. 1900, the defendant above named filed in the above entitled court in the

above entitled matter, its answer, which is in the words and figures following, to wit:

61 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE CREEDE AND CRIPPLE CREEK MINING AND Milling Company, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION Company, Defendant. } 3658. Law.

Answer.

Now comes the defendant and answering the plaintiff's complaint heretofore filed herein says that:

First. It admits that the plaintiff is and was a corporation organized and existing under the laws of the State of Colorado for the purpose of owning and developing mines and mining property as in said complaint alleged.

Second. It admits that the plaintiff by virtue of its articles of incorporation, is authorized to take over, own, possess, and work mines and mining claims as in said complaint alleged.

Third. It admits that the defendant is a corporation organized and existing under the laws of the State of Iowa and has the right to do, and is doing, business within the State of Colorado by virtue of a full compliance with the laws of said State concerning foreign corporations.

Fourth. It denies that the plaintiff is now, for more than five years prior to the commencement of this action was, or that it ever was the owner in fee of the pretended Ocean Wave and Little Mary Lode mining claims; but it admits, upon information and belief, that the plaintiff by some means, obtained an alleged patent for said claims

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which patent the defendant alleges was not obtained nor issued in pursuance of the statutes of the United States which provide for the issuance of patents, and that such patent is and should be wholly null and void. It further alleges that said Ocean Wave and Little Mary Lode mining claims were not, nor were either of them located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered or uncovered in the discovery shaft of said Ocean Wave Lode mining claim or of said Little Mary Lode mining claim.

It further denies that the plaintiff for more than five years prior to the beginning of this action, or that it ever, was in possession or entitled to the possession of said lode mining claims or either of them.

62 Fifth. It denies that said Little Mary and said Ocean Wave Lode mining claims, or either of them, were discovered or located, at any time by J. B. Winchell and E. W. McNeal, or by either of them or by any person;

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and denies that said patent relates back to or takes effect from the date of said alleged discovery and location for all purposes or for any purpose given or provided by the laws of the United States or of the State of Colorado concerning mining claim-; but it alleges that there never was, at any time or by any person, any location whatever made of said pretended Ocean Wave Lode mining claim or of said Little Mary Lode mining claim.

Sixth. It denies that at any time, by means of a tunnel driven into and under said alleged mining claims, or either of them, this defendant wrongfully or unlawfully ousted the plaintiff from the possession of so much of said premises as has been penetrated by said alleged tunnel, or that it did so without the knowledge or consent of the plaintiff;

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but the defendant alleges that the plaintiff and its officers, and particularly its directors and those in the possession, control, and management of the workings of said alleged lode mining claims, for more than a year last prior to the beginning of this action, have had full knowledge that the defendant was driving its said tunnel into, through, and across said pretended Ocean Wave and Little Mary Lode mining claims, and that the same was so driven into, through, and across said alleged lode mining claims with the knowledge and consent of the plaintiff and of the persons who were in possession of, and who were working and developing said alleged lode mining claims. The defendant further denies that it wrongfully or unlawfully retains possession of any part or portion of either of said alleged lode mining claims.

Seventh. It denies that by means of or with said tunnel the defendant has entered into, upon, and underneath said alleged premises and ousted the plaintiff therefrom at the point in said complaint alleged or at all.

Eighth. It admits that the amount and value of the property in controversy exceeds, exclusive of interest, the sum of two thousand dollars.

Ninth. The defendant further answering, and as a further defense to the plaintiff's complaint, alleges that it is a corporation organized and existing under and by virtue of the laws of the State of Iowa, and a citizen of said State doing business in the State of Colorado, by virtue of a full compliance with the laws of said State concerning foreign corporations; that it was organized for the pur-
63 pose, among other things, of owning, operating, and developing lodes and lode mining claims in the then county of El Paso, now county of Teller, and State of Colorado; and that it now is and during all the times hereinafter mentioned was the owner by itself and its grantors, and in possession of the Uinta tunnel and tunnel site location and of all the rights and privileges thereunto belonging and appertaining.

Tenth. It alleges that said Uinta tunnel and tunnel site location was made by William E. Hall, W. R. Mason, and Herman Tieje on the thirteenth day of January, 1892; that said Hall, Mason, and Tieje, were, at the time of the location thereof, citizens of the United States, and over the age of twenty-one years; that they entered upon the unoccupied public mineral domain of the United States and located said Uinta tunnel and tunnel site, by placing at the face thereof a plain sign or notice containing the name of the Uinta tunnel, the course and distance thereof, the date of the location, the general course thereof, and the name of said locators above named; that, in addition thereto, they placed at the face of said tunnel a written notice, describing said Uinta tunnel by metes and bounds, and giving the course thereof; and that they afterwards marked the same upon the surface, and the same was designated upon the ground by a line run through the trees and underbrush upon said mountain, and by stakes set at intervals along said line duly marked with the name of said tunnel site, so that the same could be easily designated upon the ground by a line run through the trees and underbrush upon said mountain, and by stakes set at intervals along said line duly marked with the name of said tunnel site, so that the same could be easily designated upon the ground and along the surface thereof.

Eleventh. It alleges that said Uinta tunnel and tunnel site location was made under and in compliance with the provisions of section 2323 of the Revised Statutes of the United States, and the rules and regulations adopted by the Department of the Interior of the United States thereunder, and was located on the thirteenth day of January, 1892, as will appear from the location certificate thereof, which fully appears in and by the records of the county of El Paso, where

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the same is duly and at length recorded in book 79, at page 492, of the records of said county, and that the defendant by divers mesne conveyances, acquired said Uinta tunnel and tunnel site location, and all the rights, properties, and possessions thereunto appertaining and belonging on or about the sixteenth day of May, 1896, and has ever since said time been the owner thereof, together with all the rights belonging thereto.

64 Twelfth. It alleges that prior to the acquisition by it of the title of said tunnel, work had been diligently prosecuted thereon from the time of its location up to the time of the aforesaid (purchaser) thereof by this defendant, and that the same was prosecuted in full compliance with the provisions of section 2323 of the Revised Statutes of the United States; that at no time was work abandoned, neglected, or discontinued for any successive period of six months, but that the same was prosecuted with due diligence at all times prior to the purchase thereof by this defendant; that from the time of its said purchase the defendant has prosecuted the work therein and thereon with great diligence for the purpose of boring said tunnel, and also for the discovery of veins therein and in the manner and to the extent provided for under section 2323 of the Revised Statutes of the United States; and that at no time since the defendant has been the owner thereof has work been discontinued for a period of six consecutive months.

Thirteenth. It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars ($125,000) and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars ($10,000).

Fourteenth. It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location under and by virtue of the laws of the United States, and under the provisions of section 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of and in reliance upon said statute.

Fifteenth. It alleges that said Uinta tunnel entered the westerly side lines of the pretended Little Mary Lode mining claim at a point distant from the mouth or portal of said tunnel about 550 feet, more than one year prior to the commencement of the above entitled action; that said tunnel was driven through said pretended Little Mary Lode mining claim with great diligence, and was driven on its course

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hrough the side lines of said pretended Ocean Wave Lode
ining claim, and when said tunnel had been driven through
aid pretended Ocean Wave and Little Mary Lode mining
laims, it was distant from the mouth or portal thereof about
175 feet; that in running said tunnel through said pre-
tended Ocean Wave and Little Mary lode- and lode
5 mining claims the defendant drove the same a dis-
tance of about six hundred and twenty-five feet; that
he same was driven through said pretended Ocean Wave
nd Little Mary Lode mining claims with the full knowledge
nd consent of the plaintiff at the great cost and expense as
bove set forth; that said tunnel was so driven through said
retended lode mining claims more than a year prior to the
ommencement of the above entitled action, without any pro-
est or objection made by the plaintiff or its officers, em-
loyés, or agents; but that the driving of said tunnel was
cquiesced in by the plaintiff, its officers, servants, and em-
loyés; and that after driving said tunnel through and across
aid pretended Ocean Wave and Little Mary Lode mining
laims, the defendant continued the prosecution of its said
unnel and drove the same to a distance of about twenty-two
undred feet and until it reached and penetrated the territory
hat is claimed by the Portland Gold Mining Company, and
t was after said tunnel had reached said distance that the
laintiff instituted the above entitled action, and the same
was then instituted by the plaintiff because, for the reason,
nd on account of the matters and things hereinafter recited
and set forth.

Sixteenth. Further answeriag it alleges that, at a point dis-
tant from the mouth or portal of said tunnel, and in and
upon the line thereof about nineteen hundred and thirty-one
feet, and upon the ground embraced within the surface
boundaries of the location of said tunnel, and within the lo-
cation of the bore thereof, which location of said tunnel was
made long prior to any location upon said territory by any
other person or persons, the defendant, in driving its said
tunnel discovered, uncovered, and disclosed a vein and lode
in rock in place bearing gold, silver, and other precious
metals, which said vein entered said tunnel and was parallel
to the line of said tunnel for a distance of more than five
hundred feet, and is still within said tunnel and within the
breast thereof; that the same is now on the line and bore
thereof near the south line of said tunnel; that said tunnel
is at present driven into the mountain for a distance slightly
exceeding twenty-two hundred feet, and is through and be-
yond the easterly side line of said pretended Ocean Wave
Lode mining claim about eleven hundred feet; that said vein
is intersected, uncovered, and discovered in said tunnel as
above set forth, and is described as the Uinta Tunnel No. 23
lode, and is a cross lode to any lode ever uncovered and dis-

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covered in said territory by any person or persons; and that the same was never uncovered or discovered by any person or persons until the same was discovered and cut as aforesaid by said Uinta tunnel.

66 Seventeenth. It alleges that in driving said tunnel it has followed said cross lode by it discovered as aforesaid upon territory which was segregated and marked and upon ground appropriated by said tunnel location parallel in location thereto, as it had full right and authority to do in virtue and by right of section 2336 Revised Statutes of the United States; that it located said cross lode by calling it Uinta Tunnel No. 23 lode and mining claim, and by placing at the mouth of said tunnel in a conspicuous place a location certificate showing the general course of said lode and the number of feet claimed on each side of the discovery thereof together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator thereof, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused a location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — records of said clerk and recorder and claimed by the location thereof from point of discovery thereof running twelve hundred feet southerly and three hundred feet northerly; that said cross lode is at the present time disclosed and uncovered and appears in the breast of said tunnel running almost parallel with the course of said tunnel; that under and by virtue of the Revised Statutes of the United States hereinabove referred to, and in, under, and by virtue of the terms of section 2336 thereof, this defendant has the right to own, possess, and enjoy said cross lode so by it uncovered, and discovered as aforesaid, and to mine, extract, remove, and sell the ores therefrom; and that said vein so uncovered and disclosed as aforesaid and now appearing at the breast of said tunnel is a well-defined gold and silver bearing lode of vein in rock in place, between the walls of rock, and is valuable for mining and for the minerals therein contained; that said cross lode by it discovered as aforesaid was never uncovered, disclosed, or discovered by the plaintiff in any workings upon said pretended Ocean Wave and Little Mary Lode mining claims, whether done by said plaintiff or any other person or persons whomsoever; that the defendant has claimed and still claims the right to own, possess, and operate, said lode as of the date, or by virtue of said location of said Uinta tunnel, to wit, of the thirteenth day of January, A. D. 1892, as was set forth and claimed in and by virtue of said location certificate thereof, hereinbefore described and by virtue of said notice posted at the mouth of said Uinta tunnel, as hereinbefore alleged; that said vein so uncovered and disclosed as

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aforesaid does not outcrop or appear at the surface nor was the same known to exist at the time of the location of said Uinta tunnel, or until the same was discovered by this
67 defendant as it was discovered by it on or about the eighteenth day of December, A. D. 1897; that the defendant, under and by virtue of said discovery has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine, extract, and sell ores and minerals from said vein over, through, and along said tunnel as said tunnel entered along and across said pretended Ocean Wave and Little Mary Lode mining claims; that the defendant claims the right to use the bore of said tunnel by reason of the facts aforesaid as it penetrates said Little Mary lode and lode mining claim, and across the same as hereinabove stated, and as said tunnel likewise penetrates through and across said pretended Ocean Wave lode and lode mining claim as hereinabove stated; that the plaintiff by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with this defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims; but on the contrary the plaintiff by its conduct and actions in the premises as hereinbefore recited and set forth, has permitted and allowed this defendant to expend said large sums of money and has permitted and allowed it so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lode- and lode mining claims, until the same has ripened into such a license and permission to so cross said pretended Ocean Wave and Little Mary lode- and lode mining claims, that the defendant cannot now be disturbed in its use of said tunnel.

Eighteenth. It alleges that at a point distant from the mouth or portal of said tunnel, and in and upon the line thereof two thousand one hundred and two feet, upon the ground embraced within the surface boundaries of the location of said Uinta Tunnel location and within the bore thereof, which location of said tunnel was made long prior to any location upon said territory by any other person or persons whatever; that in driving said tunnel this defendant discovered, uncovered, and disclosed a vein and lode in rock in place, which carries gold, silver, and other precious metals on the twenty-third day of December, A. D. 1897, which said vein was cut, crossed, intersected, and penetrated by said tunnel and said vein so discovered as aforesaid had been segregated from the public domain of the United States, and located and appropriated by said Uinta tunnel and tunnel site, and is upon ground that was appropriated by said Uinta Tunnel location long prior to any other location, or attempted

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or pretended location thereof; that this defendant lo-
68 cated said vein by calling the same Uinta Tunnel No. 24 lode, and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof, setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator thereof, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — among the records in the office of said clerk and recorder, and claimed by the location thereof from the point of discovery thereof running northerly seven hundred and fifty feet, and southerly seven hundred and fifty feet; that said discovery of said Uinta Tunnel No. 24 lode was made on the twenty-third day of December, A. D. 1897, in full conformity with the laws of the United States and of the State of Colorado, in reference to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place near the mouth of said tunnel, and the other recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 24 lode and the vein therein discovered as aforesaid does not outcrop, apex, or appear on the surface of the ground at any point whatever; and that this defendant has claimed and has the right to own, possess, operate, and enjoy said lode, as of the date and by virtue of the location of said Uinta Tunnel No. 24 lode, to wit, on the thirteenth day of January, A. D. 1892, and so sets forth and claims in and by virtue of said location certificate thereof hereinbefore described, and by virtue of said notice posted at the mouth of said Uinta Tunnel No. 24 lode, as hereinbefore alleged; that, under and by virtue of said discovery, it has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine, extract, and sell the ores and mineral from said vein, and has the right to remove said ores and minerals by it mined and extracted through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim, and across said pretended Little Mary lode and lode mining claim, as well as across and along said pretended Ocean Wave lode and lode mining claim; that the defendant claims the right to use the bore of said tunnel through and across said pretended Ocean Wave and Little Mary Lode mining claims by reason of the facts aforesaid, and that the plaintiff by permitting and allowing this defendant to spend more than the

sum of one hundred and thirty-five thousand dollars
69 ($135,000.00) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims, but that on the contrary the plaintiff, by its conduct and actions in the premises as hereinabove recited and set forth, has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars ($135,000) and has permitted and allowed the defendant to so proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lode- and lode mining claims until the same has ripened into such a license and permission as entitles the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lode- and lode mining claim-, and that said license and permission is such that the defendant can not be disturbed herein.

Nineteenth. It alleges that at a point in said tunnel from the mouth or portal thereof about two thousand one hundred and eighteen feet, upon ground embraced within the surface boundaries of said Uinta tunnel and within the bore thereof, which location of said tunnel was prior to any other location made on said territory aforesaid, the defendant, in driving and prosecuting said tunnel, uncovered, and discovered on the sixth day of January, A. D. 1899, a well-defined lode or vein, in rock in place, which carried gold, silver, and other precious metals, which said vein was cut, crossed, intersected, and penetrated by said tunnel; that said vein so discovered as aforesaid has been segregated from the public domain of the United States, and located and appropriated by the Uinta tunnel location long prior to any location or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 25 lode, and placed and erected at the mouth of said tunnel in a conspicuous place, a location certificate or notice thereof setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused a location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — among the records in the office of said clerk and recorder, and claimed by the location thereof from the point of discovery thereof, running seven hundred and fifty feet in a northerly direction and seven hundred and fifty feet in a southerly direction; that said discovery of said

1901, Dec. 6. Motion to strike granted.

1901, Dec. 6. Motion to strike granted.

70 Unita Tunnel No. 25 lode was had and made on the sixth day of January, A. D. 1897, in full conformity with the laws of the United States and of the State of Colorado, in reference to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place at the mouth of said tunnel as aforesaid and the other thereof recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 25 lode and vein thereof as aforesaid does not outcrop, apex, or appear at the surface, or at any other point whatever; that under and by virtue of said discovery, this defendant has the right to mine, extract, remove, and sell the ores and minerals therefrom; that said vein was uncovered and discovered as aforesaid and known as and called Uinta Tunnel No. 25 lode, is a well defined vein between two walls, in rock in place and carries gold silver, and other precious metals; that said lode was never uncovered or discovered by the plaintiff or any other person or persons whomsoever; and that this defendant has claimed and has the right to own, possess, operate, and enjoy said lode as of the date by virtue of the location of said Uinta tunnel, to wit, the thirteenth day of January, A. D. 1892, and so sets forth and claims in and by virtue of said location certificate thereof, hereinbefore described, and by virtue of said notice posted at the mouth of said Uinta tunnel as hereinbefore alleged; that it has the right to remove said ores and minerals, by it mined and extracted from said Uinta Tunnel No. 25 lode, through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim and across said pretended Little Mary lode and lode mining claim, as well as along and across said pretended Ocean Wave lode and lode mining claim; that it claims the right to use the bore of said tunnel, through, and across said pretended Ocean Wave and Little Mary lode- and lode mining claims, by reason of the facts aforesaid; that the plaintiff by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with this defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims; but on the contrary the plaintiff by its conduct and actions in the premises hereinabove recited and set forth, has permitted and allowed the defendant to expend the sum of more than one hundred and thirty-five thousand dollars ($135,000) and has permitted and allowed the defendant to so proceed with said tunnel, through, and across said pretended Ocean Wave and Little Mary lode mining claims, until the same has ripened into such a license and permission as entitles

71 the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lode- and lode mining claims; and that said license and permission is such that the defendant can not be disturbed therein.

Twentieth. It alleges that at a point in said tunnel distant from the mouth or portal about two thousand one hundred and eighty feet, upon ground embraced within the surface boundaries of said tunnel and within the bore thereof, which location of said tunnel was prior to any other location made on said territory this defendant, in driving and prosecuting its said tunnel uncovered and discovered, on the fifteenth day of December, A. D. 1897, a well defined lode or vein in rock in place, which carries gold, silver and other precious metals, which said vein was cut, crossed, intersected, and penetrated by said tunnel; that said vein so discovered as aforesaid had been segregated from the public domain of the United States, and located and appropriated by said location of said Uinta tunnel and tunnel site, and is upon ground that was appropriated by said Uinta Tunnel location long prior to any other location or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 26 lode, and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof, setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof, showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado in Book 278, at page — among the records in the office of said clerk and recorder; that it claimed by the location thereof and upon the discovery thereof one thousand feet running in a northerly direction and five hundred feet in a southerly direction from the point of discovery thereof; that said discovery of said Uinta Tunnel No. 26 lode was had and made on the fifteenth day of December, A. D. 1897, in full conformity with the laws of the United States and of the State of Colorado, in reference to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place at the mouth of said tunnel as aforesaid, and the other thereof recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 26 lode does not outcrop, apex, or appear at

72 the surface of the ground at any point whatever; that said vein uncovered and discovered as aforesaid, and known as and called Uinta Tunnel No. 26 lode, is a well defined vein between two walls of rock in place, and carries

1901, Dec. 6. Motion to strike granted.

gold, silver, and other precious metals; that said lode was never uncovered or discovered by the plaintiff or any other person or persons whomsoever; that this defendant further claims that it has the right to own, possess, operate, and enjoy said lode as of the date and by virtue of the location of said tunnel, to wit, on the thirteenth day of January, A. D. 1892, that by virtue of said location certificate thereof hereinbefore described, and by virtue of said notice posted at the mouth of said tunnel as hereinbefore alleged, it has the right to remove said ores and minerals, by it mined and extracted from said Uinta Tunnel No. 26 lode, through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim and across said Little Mary lode and lode mining claim, as well as along and across said pretended Ocean Wave lode and lode mining claim; that this defendant claims the right to use the bore of said tunnel, through, and across said pretended Little Mary and Ocean Wave lode and lode mining claim- by reason of the facts aforesaid; that the plaintiff by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid, in reaching, uncovering, and discovering said ore body, has no right to interefere with this defendant in crossing over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims; but on the contrary the plaintiff by its conduct and actions in the premises as hereinbefore set forth, has permitted and allowed the defendant to expend said large sum of money, and has permitted and allowed the defendant to so proceed with its said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims, until the same has ripened into a license and permission such as entitled the defendant to use its said tunnel as it penetrated said pretended Ocean Wave and Little Mary lodes and lode mining claims; and that said license and permission is such that the defendant can not be disturbed therein.

1901, Dec. 6. Motion to strike granted.

Twenty-first. It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the acts of Congress in reference to tunnel rights and subject to the laws of the State of Colorado in reference to the right to run tunnels through ground that may be patented, for the purpose of reaching territory that belong- to tunnel owners beyond such patented claims, and subject to the rights which the de-
73 fendant The Uinta Tunnel Mining and Transportation Company and its grantors, had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims that it might cut or discover in driving said tunnel, as is guaranteed to the locator of said tunnel under and by virtue of section 2323 of the Revised

Statutes of the United States; that the pretended discovery alleged and pretended to have been made in and upon said Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the Statutes of the United States and of the State of Colorado, which authorize and provide for the location and prosecution of such tunnels and which defines and determines the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary Lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and are held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with section 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims, and to drive drifts therein, and to follow said lode claims as located by this defendant and to reach lode claims so owned by this defendant, as hereinbefore and hereinafter stated.

1901, Dec. 6. Motion to strike granted.

Twenty-second. It avers that from about twenty-two hundred and fifty feet from the mouth or portal of said Uinta tunnel, said tunnel run along, through, and across the Black Jasper lode; that on the thirteenth day of January, A. D. 1897, Vance Carothers, who was then and there a citizen of the United States over the age of twenty-one years, entered upon the unoccupied public mineral domain of the United States and located what is known as said Black Jasper Lode mining claim; that the same was marked by six substantial posts, one at each corner and one at the center of each side line thereof, which posts were hewed and marked on the sides in towards the claim; that a discovery shaft was sunk thereon to a depth of more than ten feet from the lowest point of the rim thereof at the surface, which disclosed a well defined vein which carried gold and other precious metals therein; that at the point of said discovery the locator placed a plain sign or notice containing the name of the lode, the
71 date of the discovery, the name of the locator, and the general course thereof; that afterwards, on the second day of February, A. D. 1897, said Vance Carothers caused a location certificate to be made of said Black Jasper lode, which contained the name of the lode, the name of the locator, the date of the location, and described the same by metes and bounds; that said location certificate was afterwards on the second day of February, 1897, duly recorded in the office of the clerk and recorder of El Paso county, Colorado; that this defendant, by mesne conveyances from the locator and owner

1901, Dec. 6. Motion to strike granted.

of said Black Jasper Lode mining claim, became the owner thereof and is now such owner; that said tunnel enters said Black Jasper lode as aforesaid at about twenty-two hundred and fifty feet from the mouth or portal thereof, and continues along and through said Black Jasper lode as located to the breast thereof; that this defendant has the right, under the laws of the State of Colorado and the acts of Congress, to enter, through, and along said Ocean Wave and Little Mary Lodes and lode mining claims for the purpose of reaching the lode claims owned by this defendant beyond the mouth or portal of said tunnel, and beyond said Ocean Wave and Little Mary Lodes and lode mining claims; that said Ocean Wave and Little Mary Lodes and lode mining claims lie between the mouth or portal of said tunnel and said Black Jasper Lode mining claim and between said Uinta Tunnel No. 23 lode and mining claim and said Uinta Tunnel No. 24 lode and mining claim and said Uinta Tunnel No. 25 lode and mining claim and said Uinta Tunnel No. 26 lode and mining claim, from which said last lode and mining claim this defendant has been shipping rich and valuable ore; that by reason of the ownership of said lode and mining claims last above described and by virtue of the laws of the State of Colorado, and the acts of Congress, this defendant has the right to cross through and beyond said Ocean Wave and Little Mary Lodes and lode mining claims for the purpose of reaching said lode mining claims which are owned by and which belong to this defendant.

Wherefore, the defendant prays judgment against the plaintiff that it may have the right to use and operate its said tunnel through said pretended Ocean Wave and Little Mary Lodes and lode mining claims as said tunnel is now constructed and operated.

Second. For judgment declaring that the defendant has the right to mine and extract ore by it uncovered and discovered in said Uinta Tunnel No. 23 lode, Uinta Tunnel No. 24 lode, Uinta Tunnel No. 25 lode, and Uinta Tunnel No. 26 lode, and to haul the same through its said tunnel through, across, and along said Ocean Wave and Little Mary Lodes and lode mining claims, as the same are now penetrated by said tunnel.

75 Third. For its costs of suit in this behalf expended or incurred.

C. J. HUGHES, JR., AND
SCOTT ASHTON,
Attorneys for the Defendant.

STATE OF COLORADO, } ss.:
County of Teller, }

H. E. Woods being duly sworn, on oath deposes and says that he

is the president of the Uinta Tunnel Mining and Transportation Company, the above named defendant; that he has read the above and foregoing answer and knows the contents thereof, and that the matters and things therein stated are true according to affiant's best knowledge and belief.

H. E. WOODS.

Subscribed and sworn to before me this ninth day of February, A. D. 1900.

My commission as a notary public will expires April 14th, 1903.

[SEAL.] WILLIAM D. HATTON,
Notary Public.

And be it remembered, that afterwards, and on, to wit, the twenty-fifth day of June, A. D. 1901, the plaintiff above named filed its motion in the above entitled cause, in the court above entitled, to strike from the answer of the defendant certain parts and portions thereof, which said motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for said District.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TANSPORTATION Company, Defendant. } No. 3658.

The plaintiff now comes and moves to strike from the defendant's answer to plaintiff's complaint herein, the following:

1. That part of the fourth paragraph thereof, commencing with the words "which patent" in the fourth line of the second page and ending with the words "Little Mary Lode mining claim" in the twelfth line of the same page, because the same does not constitute an answer to the complaint or serve to do so, but is wholly irrelevant redundant, immaterial, and insufficient.

76 2. All that part of the fifth paragraph beginning with the word "and denies" in the fourth line thereof and ending with the word- "claim" at the conclusion of said paragraph, because the same does not constitute an answer to the said complaint or tend to do so, but is wholly irrelevant, redundant, immaterial, and insufficient.

3. All that part of the sixth paragraph of said answer which begins with the words "but the defendant alleges" in the sixth line of said paragraph, down to the end thereof, because the same does

not constitute an answer to said complaint or any part thereof, but is wholly irrelevant, redundant, immaterial, and insufficient.

4. All of the tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second paragraphs of said answer, because the same or any of them do not constitute an answer to said complaint or tend to do so, but are each and all wholly irrelevant, redundant, immaterial and insufficient.

THOMAS, BRYANT, AND LEE,
Att'ys for Pl'ff.

Be it remembered, that afterwards, and on, to-wit, the sixth day of December, A. D. 1901, the motion to strike from the answer of defendant certain portions thereof having theretofore come on to be heard, the following order was entered by the court, to-wit:

THE CREEDE & C. C. M. & M. Co.
vs.
THE U. T. M. & T. Co. } 3658.

The motion to strike from the answer of the defendant certain portions thereof having heretofore come on to be heard, and having been argued by counsel, H. H. Lee, Esquire, appearing as attorney for the plaintiff, and C. J. Hughes, Jr., Esquire, appearing as attorney for the defendant, and having been taken under advisement and the court having considered the same and being now fully advised in the premises;

It is ordered by the court, for good and sufficient reasons to the court appearing, that said motion be and the same is hereby granted, and that all those portions of the answer commencing with the words "which patents," in the fourth line of the second page, and ending with the words "Little Mary Lode mining claim," in the twelfth line of the same page; and all that part of the fifth paragraph commencing with the words "and denies" in the fourth
77 line thereof, and ending with the word "claim" at the conclusion of said paragraph. All that part of the sixth paragraph of said answer which begins with the words "but the defendant alleges" in the sixth line of said paragraph, down to the end thereof. All the tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second paragraphs of said answer be and the same are hereby stricken from the answer to the amended complaint herein.

Friday Dec. 6th, 1901.

To the order sustaining said motion, and striking from said answer of the defendant that part of the fourth paragraph thereof commencing with the words "which patent" in the fourth line of the second page, and ending with the words "Little Mary Lode mining claim" in the twelfth line of the same page, and indicated on the

margin of said answer by red lines, the defendant then and there at that time duly excepted.

To the order sustaining said motion striking from said answer of the defendant all that part of the fifth paragraph commencing with the words "and denies" in the fourth line thereof, and ending with the word "claim" at the conclusion of said paragraph, and indicated on the margin of said answer by red lines, the defendant then and there and at that time duly excepted.

To the order sustaining said motion striking from said answer of the defendant all that part of the sixth paragraph of said answer, beginning with the words "but the defendant alleges" in the sixth line of said paragraph, down to the end thereof, and indicated on the margin of said answer by red lines the defendant then and there and at that time duly excepted, and,

To the order sustaining said motion striking from said answer of the defendant all of the tenth paragraph thereof, the defendant then and there and at that time duly excepted; to the order sustaining said motion striking from said answer of the defendant all of the eleventh paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the twelfth paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the thirteenth paragraph thereof, the defendant then and there and at that time duly excepted.

78 To the order sustaining said motion striking from said answer of the defendant all of the fourteenth paragraph thereof, the defendant then and there and at that time duly excepted.

To the order sustaining said motion striking from said answer of the defendant all of the fifteenth paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the sixteenth paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the seventeenth paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the eighteenth paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the nineteenth paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the twentieth paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the twenty-first paragraph thereof, the defendant then and there and at that time duly excepted. To the order sustaining said motion striking from said answer of the defendant all of the twenty-second paragraph

thereof, the defendant then and there and at that time duly excepted.

——— ———,
Attorneys for Defendants.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States within and for the District of Colorado.

THE CREEDE AND CRIPPLE CREEK MINING AND Milling Company, Plaintiff,
vs.
THE UINTA TUNNEL, MINING, AND TRANSPORTATION Company, Defendant.
} Law. No. 3658.

And forasmuch as the foregoing matters do not appear fully of record in the said cause, the foregoing bill of exceptions is hereby allowed, signed, sealed, and filed, as a part of the records of
79 such cause, within the time heretofore granted by this court.

Done at Denver, Colorado, this fourth day of February, A. D. 1902.

MOSES HALLETT, *Judge.*

——— ———,
Attorneys for the Plaintiff.

Indorsed: No. 3658. In U. S. circuit court. The Creede & Cripple Creek Mining and Milling Company *vs.* The Uinta Tunnel Mining and Transportation Company. Bill of exceptions on order striking part of answer. Filed Feb. 4, 1902. Robert Bailey, clerk. Charles J. Hughes, Jr., defendant's attorney.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company, Plaintiff,
vs.
THE UINTA TUNNEL MINING AND TRANSPORTATION Company, Defendant.
} No. 3658.

Bill of Exceptions.

Be it remembered that the above entitled cause coming on for trial before the Honorable John A. Riner, district judge of the dis-

ict of Wyoming, assigned to the district of Colorado, on the 29th ıy of January, A. D. 1902, at the hour of 2 o'clock p. m., the same ing one of the regular juridical days of the November term of said ourt, the plaintiff appearing by Messrs. C. S. Thomas and H. H. ee, its attorneys, and the defendant by Scott Ashton, Esquire, its torney, the following proceedings were had:

Thereupon counsel for plaintiff made the following statement:

Mr. LEE: If your honor please, under our construction of this case, is proceeding is purely *pro forma*. We contend that every issue the case has been already determined by this court in passing pon motions affecting the pleadings, so that in making a statement the case I think that the court would be more interested in it than erhaps the jury because we shall contend that there will be noth- g left to the jury except to bring in a verdict in keeping with the instructions of the court.

Thereupon after discussion, the court stated as follows:

The COURT: So far as this court is concerned, we would feel ound by Judge Hallett's rulings.

Thereupon, the plaintiff, to maintain the issues on its part, intro- uced the following evidence, to wit:

Plaintiff's Testimony.

Thereupon counsel for plaintiff offered a certified copy of the loca- on certificate of the Ocean Wave Lode mining claim, same being arked Exhibit 1, complainant's proofs. (See page 33.)

To which offer counsel for defendant objected as being incompe- nt, immaterial, and irrelevant at this time, because there is no roof that there was a discovery of ore in the discovery shaft or else- here within the surface boundaries of the Ocean Wave Lode min- g claim, and for the further reason that it is alleged in the peti- on that there was such a discovery, which is denied in the answer, nd there is no proof thereof.

Which objection the court overruled, allowing said Exhibit 1 to e received in evidence.

To which ruling of the court counsel for defendant then and there ıly excepted.

Thereupon counsel for plaintiff offered in evidence a certified copy f the location certificate of the Little Mary Lode mining claim, same eing marked Exhibit 2, complainant's proofs. (See page 37.)

To which offer counsel for defendant objected as being incompe- nt, immaterial, and irrelevant at this time, because there is no roof that there was a discovery of ore in the discovery shaft or else- here within the surface boundaries of the Little Mary Lode mining aim, and for the further reason that it is alleged in the petition at there was such a discovery, which is denied in the answer, and here is no proof thereof.

Which objection the court overruled, allowing said Exhibit 2 to e received in evidence.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for plaintiff offered in evidence certified copies of seven deeds and three original deeds, ten deeds in all, showing the passing of the title of the Ocean Wave and Little Mary Lode mining claims from the locators to the plaintiff in this case,
81 same being marked respectively, Exhibits 3 (page 41), 4 (page 47), 5 (page 52), 6 (page 57), 7 (page 62), 8 (page 67), 9 (page 72), 10 (page 77), 11 (page 82), and 12 (page 86), complainant's proofs.

To which offer counsel for defendant objected, objecting to each exhibit separately as being incompetent, immaterial, and irrelevant at this time, because there is no proof that there was a discovery of ore in the discovery shaft or elsewhere within the surface boundaries of the Little Mary and Ocean Wave Lode mining claims, and for the further reason that it is alleged in the petition that there was such discovery, which is denied in the answer, and there is no proof thereof.

Which objection the court overruled, allowing said Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, to be received in evidence.

To which ruling of the court counsel for defendant then and there duly excepted.

The COURT: You concede, Mr. Ashton, that these deeds upon their face show a continuous title from the locators to the plaintiff?

Mr. ASHTON: Yes, sir.

Thereupon, counsel for plaintiff offered in evidence certified copy of the amended location certificate of the Ocean Wave Lode mining claim, same being marked Exhibit 13, complainant's proofs. (See page 90.)

To which offer counsel for defendant objected as being incompetent, immaterial, and irrelevant at this time, because there is no proof that there was a discovery of ore in the discovery shaft or elsewhere within the surface boundaries of the Ocean Wave Lode mining claim, and for the further reason that it is alleged in the petition that there was such a discovery, which is denied in the answer, and there is no proof thereof.

Which objection the court overruled, allowing said Exhibit 13 to be received in evidence.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for plaintiff offered in evidence certified copy of the amended location certificate of the Little Mary Lode mining claim, same being marked Exhibit 14, complainant's proofs. (See page 95.)

To which offer counsel for defendant objected as being incompetent, immaterial, and irrelevant at this time, because there is no proof that there was a discovery of ore in the discovery shaft or elsewhere within the surface boundaries of the Little Mary
82 Lode mining claim, and for the further reason that it is alleged in the petition that there was such a discovery, which is denied in the answer and there is no proof thereof.

Which objection the court overruled, allowing said Exhibit 14 to be received in evidence.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for plaintiff offered in evidence the patent of the United States to The Creede and Cripple Creek Mining and Milling Company plaintiff herein, for the Ocean Wave and Little Mary Lode mining claims, survey No. 8192, same being marked Exhibit 15, complainant's proofs. (See page 100.)

To which offer counsel for defendant objected as being incompetent, immaterial, and irrelevant, for the reason that the proper foundation has not been predicated to introduce said patent in evidence, in this, that there has been no proof offered of the discovery of mineral in either of the discovery shafts, or elsewhere, upon the Little Mary and Ocean Wave Lode mining claims. Which objection the court overruled, allowing said Exhibit 15 to be received in evidence.

To which ruling of the court counsel for defendant then and there duly excepted.

And this was all the evidence produced or offered by the plaintiff.

Thereupon the defendant, to maintain the issues on its part, introduced the following evidence, to wit:

Defendant's Testimony.

L. W. DAVIS, a witness produced on behalf of the defendant, being duly sworn in answer to interrogatories propounded to him testified as follows:

Direct examination.

By Mr. ASHTON:

Q. What is you name?
A. L. W. Davis.
Q. What is your business?
A. Mining engineer.
Q. Where do you reside?
A. Victor, Colorado.
Q. How long have you resided there, Mr. Davis?
A. Since 1894.
Q. How long have you been a mining engineer?
A. About fourteen years.
Q. I will ask you if you are acquainted with Uinta Tunnel No. 1 lode, the Uinta Tunnel, the Little Mary and Ocean Wave lodes and the Black Jasper lode in the Cripple Creek mining district, in the county of Teller and State of Colorado.
A. I am.
83 Q. How long have you been acquainted with those properties?

A. I have known the Tunnel, the Little Mary and the Ocean Wave since about 1893, or '4. The Black Jasper I have known ever since about the time of its location, I think 1897.

Q. Will you point upon the map (Exhibit A) where the Uinta Tunnel No. 1 lode is?

A. (Indicates same.) On this map north lies in the direction the pointer points up (indicating) and south towards the bottom. The Uinta Tunnel No. 1 lode is at this point here (indicating) survey No. 9185.

Q. Where is the face or portal of the Uinta Tunnel?

A. It is the place where I point, located on Uinta Tunnel No. 1 lode.

Q. You mean that it is embraced within the——

A. Surface boundaries.

Q. What is the distance of that tunnel?

A. The bore of the tunnel is driven as I indicate, about 2245 feet.

Q. Where is the breast of the tunnel indicated upon the map?

A. (Indicates.) Inside of the surface boundaries of the Black Jasper.

Q. Where would 3,000 feet from the face of the tunnel to the breast be upon the map?

A. Extended forward?

Q. Yes, sir, a distance of 3,000 feet?

A. (Indicating.) It would be approximately the point where I hold the ends of the pointer, inside of the Black Jasper surface boundaries.

Q. And how far from the westerly end lines of the Black Jasper claim, approximately?

A. Some 700 feet.

Q. How far is it from the face of the tunnel to the westerly side line of the Little Mary Lode mining claim?

A. About 554 feet from the portal of the tunnel to the west side line of the Little Mary.

Q. Face or portal?

A. From the portal of the tunnel to the westerly side line of the Little Mary is about 554 feet.

Q. What is the distance of the tunnel across the Little Mary and Ocean Wave lodes?

A. Approximately 593 feet.

Q. How far is it from the easterly side line of the Ocean Wave as far as the tunnel was driven—the distance that the tunnel was driven?

A. Beyond the east side line?

Q. Beyond the east side line of the Ocean Wave until it was stopped?

84 A. The tunnel at the present time is in distance about 1,098 feet from the easterly side line of the Ocean Wave lode to the present face of the tunnel.

Q. I will ask you if that map (Exhibit A) was made by you from

an actual survey of the claims indicated upon the map upon the ground.

A. Principally from that; also from the records to a certain extent.

Q. Does the map correctly show the location of the Uinta Tunnel, the Uinta Tunnel No. 1 lode, the Little Mary, Ocean Wave, and Black Jasper lodes?

A. It does.

Q. Where was the discovery, if you know, of the Uinta Tunnel No. 23 lode.

Objected to as incompetent, immaterial and irrelevant.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. Was that discovery made by driving continuously along the bore of the tunnel for over a distance of 600 feet?

Objected to as incompetent, immaterial, and irrelevant, Uinta Tunnel No. 23 lode being some 800 or 900 feet distant from the ground in controversy.

Which objection the court sustained.

To which ruling of the court counsel for the defendant then and there duly excepted.

Thereupon counsel for defendant made the following offer:

To prove by this witness that there was uncovered and discovered in the bore of the tunnel at a point about 750 feet east of the easterly side line of the Ocean Wave lode a vein of mineral in rock in place carrying rich and valuable ores; that that vein was continuous with the bore of the tunnel for a distance of 600 feet; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein and of great value, carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel; that after the discovery thereof there was a proper location made of said lode by the defendant by staking the same and posting at the portal of the tunnel a proper notice and thereafter making and recording a location certificate thereof.

85 To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove or support any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. State if you know Mr. Davis, at what point in the tunnel there was a discovery, if any was made, of the vein or lode known as the Uinta Tunnel No. 24 lode?

Objected to as incompetent, immaterial, and irrelevant.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following offer:

To prove by this witness that there was uncovered and discovered in the bore of the tunnel at a point about 955 feet east of the easterly side line of the Ocean Wave lode a vein of mineral in rock in place carrying rich and valuable ores; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein and of great value, carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel; that after the discovery thereof there was a proper location made of said lode by the defendant by staking the same and posting at the portal of the tunnel a proper notice and thereafter making and recording a location certificate thereof.

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, as offering to show geological conditions nearly 1,000 feet distant from the ground in controversy.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. Do you know where the discovery was made, if any, in the tunnel of the Uinta Tunnel No. 25 lode?

Objected to as incompetent, immaterial, and irrelevant.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

86 Thereupon counsel for defendant made the following offer:

To prove by this witness that there was uncovered and discovered in the bore of the tunnel at a point about 971 feet east of the easterly side line of the Ocean Wave lode a vein of mineral in rock in place carrying rich and valuable ores; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein and of great value carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within

the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel. That after the discovery thereof there was a proper location made of said lode by the defendant by staking the same, posting at the portal of the tunnel a proper notice and thereafter making and recording a location certificate thereof.

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to support or prove any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. State, if you know, Mr. Davis, at what point in the tunnel there was a discovery, if any was made, of the vein or lode known as the Uinta Tunnel No. 26 lode?

Objected to as incompetent, immaterial, and irrelevant.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following offer:

To prove by this witness that there was uncovered and discovered in the bore of the tunnel at a point about 1034 feet east of the easterly side line of the Ocean Wave lode a vein of mineral or rock in place carrying rich and valuable ores; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein and of great value, carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel.

87 That after the discovery thereof there was a proper location made of said lode by the defendant by staking the same and posting at the portal of the tunnel a proper notice and thereafter making and recording a location certificate thereof.

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to support or prove any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant offered in evidence the map heretofore referred to, same being marked Exhibit A, defendant's proofs.

Mr. LEE: I wish to cross-examine the witness before the court passes upon that.

The COURT: You may.

Cross-examination.

By Mr. LEE:

Q. Mr. Davis, do you know what the length of that tunnel was in the month of June, 1897, at the time this suit was begun?

A. No, not at that time.

Q. Do you know what property lies immediately east of the Ocean Wave Lode mining claim?

A. I don't remember what property it is.

Q. Well, properties belonging to the Portland Company lie between the Black Jasper and Ocean Wave claims, do they not?

A. No, I think not, no, sir.

Q. Well, the tunnel in 1897 had not reached the Black Jasper, had it?

A. I don't know as to that.

Q. You have shown the Black Jasper on the map (Exhibit A) with what dimensions?

A. It is 1500 feet in length.

Q. And how many feet in width?

A. About 300.

Q. What is the actual size of the Black Jasper as patented?

A. I don't know that.

Q. This is all patented territory is it not—the most of it covered by the Black Jasper claim really belongs to other claims, does it not?

A. I think it does.

Q. Is it not true that there is only a small fraction of an acre in the Black Jasper claim?

A. That is my understanding.

Q. So that when you show the Black Jasper claim as 1500 feet long and 300 feet wide, it is shown as covering property that belongs to other people rather than this defendant?

A. Yes, sir.

Mr. LEE: I object to the map going in because it does not show the real condition of affairs up there. It seems to me that it
88 ought to be made more specific after the testimony of the witness is given.

The COURT: I think, Mr. Ashton, you ought to designate the particular part of that claim owned by the defendant on the map.

Mr. ASHTON: We claim we have a patent to the Uinta Tunnel No. 1 lode.

The COURT: Yes; but as to the Black Jasper as marked there you can only own a small portion.

Mr. ASHTON: We simply use that (Exhibit A) for the purpose of showing we have territory beyond the Little Mary and Ocean Wave claims, whether small or great. We claim we are entitled to all of it. There is an adverse pending between the Black Jasper

and Fairplay claims for patent and that matter has not yet been determined; it is still pending and undetermined. We claim that the Black Jasper covers the greater portion of the Fairplay claim and that there is very little of the Black Jasper which is not in conflict with the Fairplay.

Mr. LEE: The defendant's contention is that if they have property on the line of their tunnel, under some construction of the United States statutes they have the right-of-way through intervening property to reach that property which belongs to them for the purpose of mining it. If any such construction is possible after what the Supreme Court has said in the Calhoun-Ajax case they certainly should first show they have the property and its location is such that the driving of this tunnel is a necessary pre-requisite to the proper working of the property.

Mr. ASHTON: We are doing the best we can to show we have property beyond the Ocean Wave and Little Mary claims by showing the location of the Black Jasper claim and location certificate. I apprehend this court would not permit us to litigate in this trial who was entitled to the possession as between the Black Jasper and Fairplay claims; that is a matter which has to be determined in some other forum and at some other time. We claim we own it. We have adversed the Fairplay and suit is now pending for the purpose of determining between the Black Jasper and Fairplay claims. I can not at this time prove we have a better and prior possession, nor will the court permit the other side to prove that.

Mr. LEE: I will ask a question.

By Mr. LEE: Is there any part of the unpatented territory covered by the Black Jasper claim that is not in controversy with the Fairplay?

A. Yes, I think there is a small portion of the eastern end that is not in controversy.

89 Q. Is the discovery shaft on the eastern end of the Jasper?

A. No, sir, it is on the western.

Q. The discovery shafts of the Jasper and Fairplay are both upon the same fraction are they not?

A. No. The Fairplay discovery shaft is on the east end of their claim, I think. The Black Jasper discovery shaft is at the point I indicate here.

Q. But the discovery shaft of the Black Jasper is upon territory which is in conflict with the Fairplay?

A. Yes, sir; I so understand.

Mr. LEE: We have no objection to the map (Exhibit A) going in with that explanation.

Thereupon counsel for defendant offered in evidence certified copy of the location certificate of Uinta Tunnel No. 23 lode, same being marked Exhibit B, defendant's proofs. (See page 109.)

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained, excluding said Exhibit B.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant offered in evidence certified copy of the location certificate of Uinta Tunnel No. 24 lode, same being marked Exhibit C. defendant's proofs. (See page 113.)

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained excluding said Exhibit C.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant offered in evidence certified copy of the location certificate of Uinta Tunnel No. 25 lode, same being marked Exhibit D. defendant's proofs. (See page 117.)

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case, and said Uinta Tunnel No. 25 lode not being upon the ground in conflict or near it.

90 Which objection the court sustained, excluding said Exhibit D.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant offered in evidence certified copy of the location certificate of Uinta Tunnel No. 26 lode, same being marked Exhibit E. defendant's proofs. (See page 121.)

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained, excluding said Exhibit E.

To which ruling of the court counsel for defendant then and there duly excepted.

W. R. MASON, a witness produced on behalf of the defendant, being duly sworn, in answer to interrogatories propounded to him, testified as follows:

Direct examination.

By Mr. ASHTON:

Q. What is your name?

A. W. R. Mason.

Q. Where do you live?

A. I live about eight miles from Durango at the present time.

Q. How long have you resided in Colorado?

A. About thirteen years.

Q. Are you acquainted with the Uinta tunnel in the Cripple Creek mining district, in the county of Teller in this State?

A. Yes, sir.

Q. When did you first become acquainted with that tunnel, Mr. Mason?

A. Well, I was on the ground about the first, I should say, of November, 1891.

Q. What if any work did you do upon the tunnel at that time?

Thereupon counsel for plaintiff objected to this line of testimony for the reason that the defendant's answer alleges the discovery and location of the tunnel subsequent to the discovery and location of the Ocean Wave and Little Mary lodes, which have since passed to patent, and therefore it is incompetent, immaterial, and irrelevant so far as this controversy is concerned what acts, if any, the witness or any one else performed upon the tunnel or in and about its location and driving. Which objection the court sustained.

91 To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following offer: To prove by this witness that in the month of November, 1891, he went to what now appears to be the portal of the Uinta tunnel, and upon the unoccupied and unappropriated public domain and started to work thereon; that afterwards and on the 18th day of February, 1892, the witness W. R. Mason, who was then a citizen of the United States over the age of twenty-one years, together with William E. Hall, who was likewise a citizen of the United States and over the age of twenty-one years, and one Herman Teitija, who was also a citizen of the United States and over the age of twenty-one years, located the Uinta tunnel claim and tunnel site and placed a notice at the portal of the tunnel containing the name of tunnel, giving its distances and courses and the names of locators or claimants; that from the time of the location thereof up to the month of September, 1895, the tunnel was worked continuously and diligently and there was no time when it remained idle for a period to exceed three months, and that the location was made in good faith and prosecuted with all the diligence that he and the locators thereof could prosecute the same until September, 1894, when it passed out of the hands of Mason, Hall and Teitija to Thomas J. Maloney. That at the time of the location and the making out of the location certificate of the Uinta tunnel on the 18th day of February, 1892, the same was surveyed; that the surface boundaries thereof were marked by substantial posts hewed in towards the bore of the tunnel, and that the tunnel was marked by posts running along the bore of the tunnel for a distance of 3,000 feet and for a distance of 1500 feet on each side thereof.

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. I will ask you if you are acquainted with the Ocean Wave and Little Mary Lode mining claims?

A. Yes, sir.

Q. At the time of making out the location certificate of the Uinta Tunnel on the 18th day of February, 1892, state, if you know, whether there had been a discovery of mineral in either of the discovery shafts of the Ocean Wave and Little Mary Lode mining claims, or in any other place, upon either of said claims?

92 Objected to as incompetent, immaterial, and irrelevant, not tending to prove any issue in this case, and for the further reason that the patent to these claims can not be attacked collaterally in this way.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following offer: To prove by this witness that at the time of the location of the Uinta Tunnel in February, 1892, and for more than a year thereafter there had been no discovery whatsoever of any kind, nature, or description of ore in the discovery shafts of either of the Little Mary or Ocean Wave lodes and mining claims or upon any other part or portion of the territory embraced within the surface boundaries of either of said lodes and mining claims.

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case, and for the further reason that the patent to these claims can not be (attac*h*ed) collaterally in this way.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant offered in evidence a certified copy of the location certificate of the Uinta Tunnel, same being marked Exhibit F, defendant's proofs. (See page 125.)

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained, excluding said Exhibit F.

To which ruling of the court counsel for the defendant then and there duly excepted.

THOMAS J. MALONEY, a witness produced on behalf of the defendant, being duly sworn, in answer to interrogatories propounded to him, testified as follows:

Direct examination.

By Mr. ASHTON:

Q. What is your name?

A. Thomas J. Maloney.

Q. Are you acquainted with the Uinta Tunnel?
A. I am.
Q. When did you first become acquainted with it Mr. Maloney?
A. The latter part of July, 1894.
Q. Were you ever interested in it?
A. I was.
Q. When did you become interested in it?
93 A. About the 1st of September, 1894,—well, I was interested in it to some extent during most all of the month of August, but completed an agreement for deed——
Q. Month of August, what year?
A. Same year, 1894.
Q. What, if anything, do you know about the work being continuous upon the tunnel from August, 1894, until you parted with your possession of it.
A. I know that it was. I had a bond for a deed on the entire tunnel property from about the latter part—it took me most of the month of August to acquire the different interests and get a deed. I got a deed to the property by about the 1st of September, and from the time——
Q. From the time that you became interested in it in September, 1894, up to the time you parted with it, was it worked continuously?
A. It was.

Mr. LEE: I move to strike out the question and answer as incompetent, immaterial, and irrelevant, tending to prove no issue in this case.

Which objection the court overruled as the witness has answered the question and no objection was made to the question.

Motion denied.

Mr. LEE: The witness answered so quickly I did not have time.

Q. What time did you part with the possession of it, Mr. Maloney?
A. I parted with part of the ownership in it early in the summer of 1895.
Q. To whom?
A. To James Doyle of Victor, one-half.
Q. When did you part with the other?
A. I think it was in March, 1896.
Q. To whom?
A. To Mr. Doyle.
Q. From the time that you sold a half interest in it to Mr. Doyle, until you parted with the entire interest, do you know whether it was worked continuously between those dates or not?

Objected to as immaterial.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following offer: To prove by this witness that from the time he sold the half in-
94 terest to the time he parted with the entire interest to Mr. Doyle it was worked with great despatch and great diligence and a plant of machinery was placed at the portal of the tunnel at an expense of $10,000 or $15,000.

To which offer counsel for plaintiff objected as being, incompetent and immaterial, not tending to prove any issue in the case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

JAMES DOYLE, a witness produced on behalf of the defendant being duly sworn, in answer to inter-ogatories propounded to him testified as follows:

Direct examination.

By Mr. ASHTON:

Q. What is your name?
A. James Doyle.
Q. Where do you reside, Mr. Doyle?
A. At Victor, Colorado.
Q. How long have you resided there?
A. Since January, 1891, in that locality.
Q. Do you know the Uinta Tunnel?
A. I do.
Q. How long have you been acquainted with that tunnel?
A. Since the month of February, 1892.
Q. Did you ever become interested in the Uinta Tunnel?
A. I did.
Q. When?
A. I think in the year 1895.
Q. From whom did you derive your interest?
A. Thomas J. Maloney.
Q. After you became interested in the tunnel, I will ask you if it was worked continuously and with diligence from that time until you were enjoined by the Federal court from further proceeding with the tunnel?

Objected to as incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following offer: To prove by this witness that immediately after he became interested in and became the owner of the tunnel he placed a plant of machinery therein at an expense of $15,000; that from that time on the tunnel was driven with great despatch; that he expended in

and about the driving of the bore of the tunnel the further sum of
$50,000; that no objection was made by the Creede and Cripple
95 Creek Mining and Milling Company, its officers, servants, or
employés against the working of the tunnel; that no objection had been made by them until the tunnel was driven to its present face, a distance of 1100 feet beyond the easterly side line of the Ocean Wave lode, and then objection was only made when the then owner of the tunnel had uncovered and discovered a vein of ore from which he was mining, extracting and selling rich and valuable bodies of ore.

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following further offer: To prove by this witness that at the time of driving the tunnel through the territory embraced in the surface boundaries of the Little Mary (—) Ocean Wave Lode mining claims the control of the stock of the plaintiff was held by parties other than those that now have control of it, and that the parties now having control and who instituted this suit purchased the control of the stock for the purpose of annoying and harrassing this witness in the driving and prosecuting of his tunnel and to prevent him from extracting the ore and mineral which he had uncovered and discovered in driving the tunnel.

To which offer counsel for plaintiff objected as being entirely incompetent and immaterial to any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant made the following further offer: To prove by this witness that at the time the bore of the tunnel was being driven through the Ocean Wave and Little Mary lodes the then officers and agents of the Creede and Cripple Creek Mining and Milling Company, the owners of the Little Mary and Ocean Wave Lode claims acquiesced in the driving of said tunnel through said property.

To which offer counsel for plaintiff objected as being entirely incompetent and immaterial to any issue in this case.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for defendant offered in evidence a certified
copy of the location certificate of the Black Jasper Lode,
96 mining claim, same being marked Exhibit G., defendant's
proofs. (See page 129.)

To which offer counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in

this case, and for the further reason that there has been no testimony offered to show the discovery or any of the acts of location of the Black Jasper lode, or that it is located upon the unappropriated public mineral domain of the United States.

Mr. ASHTON: That objection is good and I withdraw the offer for a moment.

JOHN T. HAWKINS, a witness produced on behalf of the defendant, being duly sworn, in answer to interrogatories propounded to him, testified as follows:

Direct examination.

By Mr. ASHTON:

Q. What is your name?
A. John T. Hawkins.
Q. Where do you reside?
A. In the Cripple Creek mining district.
Q. How long have you resided there?
A. Eight years.
Q. What is your business?
A. Mining superintendent.
Q. How long have you been mining?
A. Twenty years.
Q. Are you acquainted with the Black Jasper Lode mining claim and the discovery shaft thereof?
A. I am.
Q. Do you know how deep it was sunk from the lowest point of the rim from the surface?

Objected to as immaterial and irrelevant.
Which objection the court overruled.

(Continuing:) Do you know whether it was sunk more than ten feet from the lowest point of the rim from the surface?
A. Yes, sir; deeper than that.
Q. Do you know whether a vein was uncovered or discovered in the Black Jasper?

Objected to as immaterial and irrelevant—
Which objection the court overruled.

A. Yes, I have seen a vein in the shaft.
Q. Did it contain values or not?
A. Yes, sir.
Q. Do you know Vance Carothers?
A. Yes, sir.
Q. How long have you known him.
A. I was not very intimately acquainted with him.
Q. What is his business?
A. Mining surveyor.

Q. Do you know whether he was over the age of twenty-one years on the 30th day of January, 1897?

97 A. Yes, sir.

Q. About how old a man was he?

A. About forty, I should think.

Q. Was he a citizen of the United States?

A. To the best of my belief.

Cross-examination.

By Mr. LEE:

Q. Where were you born?

A. In England.

Q. How long have you been in this country?

A. Since 1886.

Q. How long have you known Mr. Carothers?

A. Eighteen months—not intimately.

Q. You don't know where Mr. Carothers was born?

A. No.

Thereupon counsel for defendant renewed his offer in evidence of a certified copy of the location certificate of the Black Jasper Lode mining claim, same being marked Exhibit G, defendant's proofs.

To which offer counsel for plaintiff objected as being incompetent and immaterial, not tending to prove any issue in this case.

Which objection the court sustained, excluding said exhibit from the evidence.

To which ruling counsel for defendant then and there duly excepted.

Thereupon it was stipulated between counsel for plaintiff and defendant that counsel for defendant need not introduce the chain of proof showing the title to the Black Jasper Lode mining claim as being in the Uinta Tunnel, Mining and Transportation Company; that the Uinta Tunnel Mining and Transportation Company by mesne conveyances from the locators and their grantors is the owner of the Uinta Tunnel and that the Uinta Tunnel Mining and Transportation Company is the owner of the Uinta Tunnel, and the Black Jasper and Uinta Tunnel No. 1 lodes and mining claims.

Thereupon counsel for defendant offered in evidence a certified copy of the location certificate of Uinta Tunnel No. 1 Lode mining claim same being marked Exhibit H, defendant's proofs. (See page 134.)

To which exhibit counsel for plaintiff objected as being incompetent, immaterial, and irrelevant, not tending to prove any issue in this case.

Which objection the court sustained, excluding said Exhibit H. from the evidence.

98 To which ruling of the court counsel for defendant then and there duly excepted.

And this was all the evidence produced or offered by the defendant.

COMPLAINANT'S EXHIBITS.

EXHIBIT 1, COMPLAINANT'S PROOFS.

(In ink:) s. c. Copy.

827. *Location Certificate.*

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } ss:
County of ——, }

Know all men by these presents, that E. W. McNeal and J. B. Winchell the undersigned, have this 2d day of January, 1892, [190]* located and claimed, and by these presents do locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1892, and all subsequent acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Ocean Wave lode, vein, ledge, or deposit, along the vein thereof with all its dips, angles and variations, as allowed by law, together with 150′ *feet* on each side of the middle of said vein, at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground, within the lines of said claim 300 feet running N. 18° 30′ E. from center of discovery shaft, and 1200′ *feet* running S. 18° 30′ W. from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim in Cripple Creek mining district, county of El Paso and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1, it being northeast corner and running N. 71° 30′ W. 300 ft. to northwest corner No. 2; thence S. 18° 30′ W. 750′ to west side line center; thence S. 18° 30′ W. 750 ft. to southwest corner No. 3; thence S. 71° 30′ E. 300 ft. to southeast corner No. 4; thence N. 18° 30′ E. 750 ft. to east side line center; thence N. 18° 30′ E. 750 ft. to northeast corner No. 1 and point of beginning. This claim tied from northwest corner No. 2 to section corner 19, 20, 31, and 32 in tp. 15, S. R. 69 W. which bears N. 33° 49′ W. 2519′ *ft.*

99 Magnetic variation N. 14° 30′ E.

J. B. WINCHELL. [SEAL.]
E. W. McNEAL. [SEAL.]

Said lode was discovered on the 2d day of January, A. D. 190–1892.

Attest: —— ——.

[* Figures enclosed in brackets erased in copy.]

Date of location, Jan. 2d, A. D. 190- 1892.
Date of certificate, Jan. 29th, A. D. 190- 1892.

FRED MITTON, *Surveyor.*

Filed for record the 1st day of Feb'y A. D. 1892, at 3:29 o'clock p. m.

F. W. HOWBERT, *Clerk.*

(The foregoing document was endorsed as follows:)
Location certificate on the Ocean Wave mining claim of Creede & Cripple Ck. M. & M. Co. in Cripple Creek mining district. —— county, State of Colorado. State of Colorado, county of ——, *ss:* I hereby certify that this location certificate was filed for record in my office at — o'clock — m. —— 190- and is duly recorded in Book — at page —. —— ——, recorder, by —— ——, deputy. Fees, $—

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } *ss:*
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Ocean Wave Lode mining claim. Filed for record in my
100 office at 3:29 o'clock p. m. Feb. 1, 1892, and duly recorded in Book No. 2 at page 113 of the records of this office made from the original [paper]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

[Seal El Paso County, Colorado.]

The foregoing certification endorsed as follows:)
Certificate of copy of — made from — record — page —, this — day of —— A. D. 190-. —— ——.

[*Word enclosed in brackets erased in copy.]

EXHIBIT 2, COMPLAINANT'S PROOFS.

s-c copy (written in ink).

827. *Location Certificate.*

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents, that J. B. Winchell and E. W McNeal the undersigned, have, this 2nd day of January, 1892, [190]* located and claimed, and by these presents do locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations, 1500 linear feet and horizontal measurement on the Little Mary lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with 150 feet on each side of the middle of said vein, at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground, within the lines of said claim 300 feet running N. 18° 30' E. from center of discovery shaft, and 1200 feet running S.
101 18° 30' W. from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim, in Cripple Creek mining district, county of El Paso and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1, it being northeast corner and running N. 71° 30' W. 300 feet to northwest corner No. 2; thence S. 18° 30' W. 750 feet to west side line center; thence S. 18° 30' W. 750 feet to southwest corner No. 3; thence S. 71° 30' E. 300 feet to southeast corner No. 4; thence N. 18° 30' E. 750 feet to east side line center; thence N. 18° 30' E. 750 ft. to northeast corner No. 1 and point of beginning. This claim tied from northeast corner No. 1 to section corner 19, 20, 31, and 32, in tp. 15 S. range 69 W. which bears N. 23° 49' W. 2519 feet. Magnetic variation N. 14° 30' E.

E. W. McNEAL. [SEAL.]
J. P. WINCHELL. [SEAL.]

Said lode was discovered on the 2d of January A. D. [190]* 1892.

Attest:

—— ——.
—— ——.

[*Figures enclosed in brackets erased in copy.]

Date of location, January 2nd A. D. 1892.
Date of certificate, Jan. 29th, A. D. 1892.
FRED E. MITTON, *Surveyor.*

Filed for record the 1 day of Feb'y A. D. 1892 at 3:28 o'clock p. m.

F. W. HOWBERT, *Clerk.*

(The foregoing document was endorsed as follows:)
Location certificate. On the Little Mary mining claim of Creede & Cripple Ck. M. & M. C. in Cripple Creek mining district, —— county, State of Colorado. State of Colorado, county of ——, *ss.* I hereby certify that this location certificate was filed for record in my office at — o'clock — m., —— — 190– and is duly recorded in Book — at page —. —— —— recorder. By —— ——, deputy. Fees, $—.

102 (Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } *ss:*
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Little Mary Lode mining claim. Filed for record in my office at 3:28 o'clock p. m. Feb. 1, 1892, and duly recorded in Book No. 2 at page 113 of the records of this office. Made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. G. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:
Certificate of copy of — Made from — record. Page —, this — day of —— A. D. 190–. —— ——.

[* Word enclosed in brackets erased in copy.]

EXHIBIT 3, COMPLAINANT'S PROOFS.

(Written in ink:) s-c copy.

832. *Mining Deed, with Additional Title. J. M.*, 2397.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

This indenture, made the 4th day of March in the year of our Lord one thousand eight hundred and ninety-two between J. B. Winchell and E. W. McNeal of the county of El Paso and State of Colorado, parties of the first part, and John N. Bartels of the county of El Paso and State of Colorado, party of the second part,

103 Witnesseth: That the said parties of the first part for and in consideration of the sum of one hundred dollars, currency of the United States of America, to him in hand paid by the said party of second part, the receipt whereof is hereby acknowledged, have granted bargained, sold, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns. An undivided one thirty-second interest in and to the following described mining claims, situate in the Cripple Creek or Wymack mining district, in El Paso county, State of Colorado, to wit: The Hillside lode, the East Lynne lode, the Snow Flake lode, the Little Doc lode, the Little Mary lode, the Ocean Wave lode, the Evening Twilight lode, the Sunset lode.

The location certificates of said above described lode claims are recorded upon the records of El Paso county, Colorado, as follows: The Hillside & East Lynne lodes in Book 2 on page 18, the Snow Flake in Book 2 on page 112; the Little Doc lode in Book 2 on page 111; the Little Mary & Ocean Wave lodes in Book 2 on page 113; the Evening Twilight lode in Book 2 page 112, the Sunset lode in Book 2 on page 17.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents issues and profits thereof; and also all the estate, right, title, interest, property possession, claim and demand whatsoever as well in law as in equity of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances;

and the said — part- of the first part, for — heirs, executors and administrators, do hereby covenant with the said part- of the second part, — heirs and assigns; that the said part- of the first part at the request of the said part- of the second part — heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all and every such further and other acts, conveyances and assurances in the law for the better assuring the said part- of the second part — heirs and assigns, of the premises, in manner as above conveyed or mentioned, and intended to be conveyed as by the said part- of the second part — heirs and assigns, or — counsel learned in the law, shall be reasonably advised and required.

104 To have and to hold, all and singular, the said premises, together with all the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

It witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. B. WINCHELL. [SEAL.]
E. W. McNEAL. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.
—— ——.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
County of Pueblo, }

I, Patrick J. Dugan, a notary public in and for said county, in the State aforesaid, do hereby certify that J. B. Winchell and E. W. McNeal who are personally known to me [as to be]* the persons whose names are subscribed to the [annexed foregoing]* deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 4th day of March, A. D. 1892.

[Matter enclosed between rules erased in copy.]

My commission expires June 18, 1895. [1]*

[NOTARIAL SEAL.] PATRICK J. DUGAN,
Notary Public.

Filed for record the 23 day of M'ch A. D., 1892, at 10:50 o'clock a. m.

F. W. HOWBERT, *Recorder.*

(The foregoing document was endorsed as follows:)

No. — Mining deed. J. B. Winchell and E. W. McNeal to John N. Bartels. State of Colorado, county of —— *ss.* I hereby that this deed was filed for record on the — day of —— 1—, at — 105 o'clock — m., in my office, and duly recorded in Book — page No. — —— —— recorder. By —— —— deputy. Fee, $— The Out West Printing and Stationery Co., Colorado Springs, Colo.

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo·

STATE OF COLORADO, } *ss:*
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain mining deed with additional title. J. B. Winchell *et al.*, to John N. Bartels. Filed for record in my office at 10:50 o'clock a. m. March 23, 1892, and duly recorded in book 142 at page 293 of the records of this office, made from the original [paper]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

[*Words and figures enclosed in brackets erased in copy.]

(The foregoing certification endorsed as follows:)

(See next page.)

Certificate of copy of — made from — record, page —, this — day of —— A. D. 190–

106 EXHIBIT 4, COMPLAINANT'S PROOFS.

(Written in ink:) s-c copy.

832. *Mining Deed, with Additional Title. J. M.* 2397.

The Out West Printing and Stationery Co., Colorado Springs, Colo

This indenture, made the 10th day of March in the year of our Lord one thousand eight hundred and ninety-two between J. B. Winchell and E. W. McNeal of the county of El Paso and State of Colorado, party of the first part, and Geo. M. Carter of the county of El Paso and State of Colorado, party of the second part:

Witnesseth: That the said party of the first part, for and in consideration of the sum of twenty-two hundred and fifty dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed and by these presents do grant, bargain, sell, remise, release, and forever qutclaim unto the said party of the second part, and to his heirs and assigns.

All of fifteen shares in eight mining claims being an undivided fifteen thirty-second (15 / 32) interest in the following lode claims, the Hillside East Lynne, Little Doc, Little Mary, Ocean Wave, Sunset, Snow Flake, and Evening Twilight all lode claims, located in Cripple Creek mining district and more particularly described in location certificates made by J. B. Winchell and E. W. McNeal and duly recorded on the records of El Paso county, Colorado.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right title, interest, property possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part of, in, or to the said premises, and every part and parcel thereof, with the appurtenances;

and the said —— —— part- of the first part, for — heirs, executors and administrators, do- hereby covenant with the said part- of the second part, — heirs and assigns; that the said part-
107 of the first part at the request of the said part- of the second part — heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all and every such further and other acts, conveyances and assurances in the law for the better assuring the said part- of the second part — heirs and assigns, of the premises, in manner as above conveyed or mentioned, and intended to be conveyed as by the said part- of the second part — heirs and assigns, or — counsel learned in the law, shall be reasonably advised and required.

To have and to hold, all and singular, the said premises, together with all the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

his
J. B. x WINCHELL. [SEAL.]
mark.
E. W. McNEAL. [SEAL.]

Signed, sealed, and delivered in presence of
H. E. BASSETT,
Witness to Mark.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
County of El Paso, }

I, H. E. Bassett, a notary public in and for said county, in the State aforesaid, do hereby certify that J. B. Winchell and E. W. McNeal who are personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this 10th day of March, A. D. 1892.

My commission expires Oct. 24th, 1895. [1]*
H. E. BASSETT,
Notary Public.

My commission expires Oct. 24, 1895.

[NOTARIAL SEAL.]

[Matter enclosed between rules erased in copy.]

Filed for record the 14 day of M'ch A. D. 1892. At 11:55 o'clock a. m.

F. W. HOWBERT, *Recorder.*

108 (The foregoing document was endorsed as follows:)

No. —. Mining deed. J. W. Winchell and E. W. McNeal to Geo. M. Carter. State of Colorado, county of ——, *ss.* I hereby certify that this deed was filed for record on the — day of —— 1— at — o'clock — m. in my office, and duly recorded in Book — page No. —. —— —— recorder. By —— ——, deputy. Fee, $— The Out West Printing and Stationery Co., Colorado Springs, Colo.

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, *County of El Paso,* } *ss:*

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true and correct copy of a certain mining deed with additional title. J. B. Winchell *et al.* to Geo. M. Carter. Filed for record in my office at 11:55 o'clock a. m. March 14, 1892, and duly recorded in Book 142 at page 247 of the records of this office. made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

109 (The foregoing certification endorsed as follows:)

Certificate of copy — made from — record, page —, this — day of —— A. D. 190–. —— ——

[* Words and figures enclosed in brackets erased in copy.]

EXHIBIT 5, COMPLAINANT'S PROOFS.

(Written in ink :) s-c copy.

832. *Mining Deed with Additional Title. J. M.* 2397.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

This indenture, made the 13th day of February, in the year of our Lord one thousand eight hundred and ninety-two, between J. B. Winchell and E. W. McNeal of the county of El Paso and State of Colorado, parties of the first part, and J. T. Estill of the county of El Paso and State of Colorado, party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable considerations [dollars,]* in lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised and released and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns one share in eight lode mining claims, being an undivided one thirty-second (1 / 32) interest in the following claims: The "Hillside" the "East Lynne" the "Sunset" the Ocean Wave, the Little Doc, the Little Mary, the "Snow Flake," the "Evening Twilight," all of said mining claims being located in Cripple Creek mining district and more particularly described by location certificates duly recorded on the records of El Paso county, Colorado.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurte-
110 nances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right title, interest, property possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of in, or to the said premises, and every part and parcel thereof, with the appurtenances;

[* Word enclosed in brackets erased in copy.]

and the said — part- of the first part, for — heirs, executors and administrators, do- hereby covenant with the said part- of the second part, — heirs and assigns; that the said part- of the first part at the request of the said part- of the second part — heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all and every such further and other acts, conveyances and assurances in the law for the better assuring the said part- of the second part — heirs and assigns, of the premises in manner as above conveyed or mentioned, and intended to be conveyed, as by the said part- of the second part — heirs and assigns, or — counsel learned in the law, shall be reasonably advised and required.

To have and to hold, all and singular, the said premises, together with all the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. B. x (his mark) WINCHELL. [SEAL.]

E. W. McNEAL. [SEAL.]

Signed, sealed, and delivered in presence of

Witness to mark

H. E. BASSETT.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
County of El Paso, }

I, H. E. Bassett, a notary public in and for said county in the State aforesaid, do hereby certify that J. B. Winchell and E. W. McNeal who are personally known to me (to be) as the persons whose names are subscribed to the annexed (foregoing) deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

111

Given under my hand and notarial seal this 13th day of February, A. D. 1892.

[Matter enclosed between rules erased in copy.]

My commission expires Oct. 24, 1895. [1]*

H. E. BASSETT,
Notary Public.

[NOTARIAL SEAL.]

Filed for record the 13 day of Feb'y, A. D. 1892, at 4:02 o'clock p. m.

F. W. HOWBERT, *Recorder.*

(The foregoing mining deed was endorsed as follows:)

No. —. Mining deed. J. B. Winchell and E. W. McNeal to J. T. Estill. State of Colorado, county of ——, *ss.* I hereby certify that this deed was filed for record on the — day of ——, 1—, at — o'clock — m., in my office, and duly recorded in Book —, page No. —. —— ——, recorder, by —— ——, deputy. Fee, $—. The Out West Printing and Stationery Co., Colorado Springs, Colo.

(Attached to the foregoing mining deed was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } *ss:*
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain mining deed with additional title. J. B. Winchell *et al.* to J. T. Estill. Filed for
112 record in my office at 4:02 o'clock p. m. Feb'y 13, 1892, and duly recorded in Book No. 142, at page 112 of the records of this office. made from the original [paper,]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan., A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:)

Certificate of copy of — made from — record, page —, this — day of ——, A. D. 190–. —— ——.

[* Word and figure enclosed in brackets erased in copy.]

EXHIBIT 6, COMPLAINANT'S PROOFS.

(Written in ink :) s-c copy.

832. *Mining Deed, with Additional Title. J. M.* 2397.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

This indenture, made the tenth day of February, in the year of our Lord one thousand eight hundred and ninety-two between J. B. Winchell and E. W. McNeal of the county of El Paso and State of Colorado, parties of the first part, and H. C. Shimp and H. E. Bassett of the county of El Paso and State of Colorado, parties of the second part:

Witnesseth: That the said parties of the first part for and in consideration of the sum of one hundred and fifty dollars in lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release, and forever quitclaim unto the said parties of the second part, and to their heirs and assigns one share in eight mining claims, being an undivided one thirty-second (1/32) interest in the following claims, the "Hillside" lode, the "East Lynne"
113 lode, the "Sunset" lode, the "Ocean Wave" lode, the "Little Doc" lode, the "Little Mary" lode, the "Snow Flake" lode and the "Evening Twilight" lode. All located in Cripple Creek mining district and more particularly described by location certificates duly recorded on the records of El Paso county, Colorado.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of in, or to the said premises, and every part and parcel thereof, with the appurtenances;

and the said —— —— part- of the first part, for — heirs, executors and administrators, do- hereby covenant with the said part- of the second part, — heirs and assigns; that the said part- of the first part at the request of the said part- of the second part — heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all and every such further and other acts, conveyances and assurances in the law for the better assuring the said part- of the second part — heirs and assigns, of the premises, in manner as above conveyed or mentioned, and intended to be conveyed, as by the said part- of the second part — heirs and assigns, or — counsel learned in the law, shall be reasonably advised and required.

To have and to hold, all and singular, the said premises, together with all the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. B. x (his mark) WINCHELL. [SEAL.]

E. W. McNEAL. [SEAL.]

Signed, sealed and delivered in presence of
Witness to mark
D. P. SILL.

114 (On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
County of El Paso, }

I, Dudley P. Sill, a notary public in and for said county, in the State aforesaid, do hereby certify that J. B. Williams and E. W. McNeal who are personally known to me [as (to be)]* the persons whose names are subscribed to the [annexed (foregoing)]* deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 10th day of February A. D. 1892.

[Matter enclosed between rules erased in copy.]

[* Words enclosed in brackets erased in copy.]

My commission expires Oct. 6th 1894.

DUDLEY P. SILL,
Notary Public.

[NOTARIAL SEAL.]

Filed for record the 13 day of Feb'y A. D. 1892, at 4 o'clock p. m.
F. W. HOWBERT, *Recorder.*

(The foregoing mining deed was endorsed as follows:)
No. —. Mining deed. J. B. Winchell and E. W. McNeal to H. C. Shimp and H. E. Bassett. State of Colorado, county of ——, ss. I hereby certify that this deed was filed for record on the — day of —— 1— at — o'clock — m. in my office, and duly recorded in Book — page No. —. —— —— recorder. By —— — — deputy. Fee, $—. The Out West Printing and Stationery Co., Colorado Springs, Colo.

115 (Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, }
County of El Paso, } *ss:*

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain mining deed with additional title, H. B. Winchell *et al.* to H. C. Shimp *et al.* Filed for record in my office at 4:00 o'clock p. m. Feb. 13, 1892, and duly recorded in Book No. 142 at page 110 of the records of this office. made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By ——, *Deputy.*

(The foregoing certification endorsed as follows:)
Certificate of copy. of — Made from — record, page —, this — day of —— A. D. 190–. ——.

[* Word enclosed in brackets erased in copy.]

EXHIBIT 7, COMPLAINANT'S PROOFS.

(Written in ink:) s-c copy.

882. *Mining Deed, with Additional Title. J. M.* 2397.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

This indenture, made the 1st day of February, in the year of our Lord one thousand eight hundred and ninety-two between
116 J. B. Winchell and E. W. McNeal of the county of El Paso and State of Colorado, parties of the first part, and H. M. Fitzhugh of the county of El Paso and State of Colorado, party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable considerations [dollars],* in lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to her heirs and assigns.

One share in eight mining claims being an undivided one thirty-second (1/32) interest in the following named claims: The "Hillside," the "East Lynne," the "Sunset," the "Ocean Wave," the "Little Mary," the "Little Doc," the "Evening Twilight" and the "Snow Flake," all in the "Cripple Creek" mining district, located and previously owned by J. B. Winchell and E. W. McNeal more particularly described by location certificates duly recorded in the records of El Paso county, Colorado.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part of, in, or to the said premises, and every part and parcel thereof, with the appurtenances,

---

[* Word enclosed in brackets erased in copy.]

and the said —— —— part- of the first part, for — heirs, executors and administrators, do hereby covenant with the said part- of the second part, — heirs and assigns; that the said part- of the first part at the request of the said part- of the second part — heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge and deliver or cause to be executed, acknowledged and delivered all and every such further and other acts, conveyances and assurances in the law for the better assuring the said part- of the second part — heirs and assigns, of the premises, in manner as above conveyed or mentioned, and intended to be conveyed, as by the said part- of the second part — heirs and and assigns, or — counsel learned in the law, shall be reasonably advised and required.

117 To have and to hold all and singular the said premises, together with all the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. B. x (his mark.) WINCHELL. [SEAL.]

E. W. McNEAL. [SEAL.]

Signed, sealed, and delivered in presence of
Witness to mark
H. E. BASSETT.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
County of El Paso, }

I, H. E. Bassett, a notary public in and for said county, in the State aforesaid, do hereby certify that J. B. Winchell and E. W. McNeal who are personally known to me [as]* to be the persons whose names are subscribed to the foregoing [annexed]* deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this first day of February, A. D. 1892.

[Matter enclosed between rules erased in copy.]

My commission expires October 24th, 1895. [1]*

[NOTARIAL SEAL.] H. E. BASSETT,
Notary Public.

Filed for record the 12 day of Feb'y A. D. 1892 at 11.22 o'clock a. m.

F. W. HOWBERT, *Recorder.*

(The foregoing mining deed was endorsed as follows:)

No. —. Mining deed. J. B. Winchell and E. W. McNeal to H. M. Fitzhugh. State of Colorado, county of —— *ss.* I hereby certify that this deed was filed for record on the — day of —— 1—
118 at — o'clock — m. in my office, and duly recorded in Book — page No. —. —— —— recorder. By —— —— deputy. Fee, $— The Out West Printing and Stationery Co., Colorado Springs, Colo.

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } *ss:*
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain mining deed with additional title. J. B. Winchell *et al.* to H. M. Fitzhugh. Filed for record in my office at 11.22 o'clock a. m. Feb'y 12, 1892, and duly recorded in Book No. 142, at page 105 of the records of this office.

Made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal of El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By ——, *Deputy.*

(The foregoing certification endorsed as follows:)

[* Words and figures enclosed in brackets erased in copy.]

Certification of copy of — made from — record, page —, this — day of —— A. D. 190– —— ——

119 EXHIBIT 8, COMPLAINANT'S PROOFS.

(Written in ink:) s-c copy.

832. *Mining Deed, with Additional Title. J. M.* 2397.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

This indenture, made the 8th day of February, in the year of our Lord one thousand eight hundred and ninety-two between J. B. Winchell and E. W. McNeal of the county of El Paso and State of Colorado, parties of the first part, and C. E. Hudson, of the county of El Paso and State of Colorado, party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable considerations, [dollars]* in lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns.

One share in eight mining claims being an undivided one thirty-second (1/32) interest in the following named claims: The "Hillside," the "East Lynne," the "Sunset," the "Ocean Wave," the "Snow Flake," the "Little Doc," the "Little Mary" and the "Evening Twilight," all in Cripple Creek mining district, located by Winchell and McNeal and more particularly described by location certificates duly recorded on the records of El Paso county, Colorado.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part of, in, or to the said premises, and every part and parcel thereof, with the appurtenances;

[* Word enclosed in brackets erased in copy.]

and the said —— ——, part- of the first part, for — heirs, executors and administrators, do- hereby covenant with the said part- of the second part, — heirs and assigns; that the said part- of the first part- at the request of the said part- of the second
120 part — heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all and every such further and other acts, conveyances and assurances in the law for the better assuring the said part- of the second part — heirs and assigns, of the premises, in manner as above conveyed or mentioned, and intended to be conveyed, as by the said part- of the second part — heirs and assigns, or — counsel learned in the law, shall be reasonably advised and required.

To have and to hold all and singular the said premises, together with all the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. B. x (his mark.) WINCHELL. [SEAL.]

E. W. McNEAL. [SEAL.]

Signed, sealed, and delivered in presence of
Witness to mark
D. P. SILL.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
County of El Paso, }

I, Dudley P. Sill, a notary public in and for said county, in the State aforesaid, do hereby certify that J. B. Winchell & E. W. McNeal (in pencil) who are personally known to me [as (to be)]* the persons whose name- are subscribed to the [annexed (foregoing)]* deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 8th day of February, A. D. 1882.

[Matter enclosed between rules erased in copy.]

My commission expires October 6th, 1894. [1]*

[NOTARIAL SEAL.] DUDLEY P. SILL,
Notary Public.

Filed for record the 13 day of Feb'y A. D. 1892 at 4:01 o'clock p. m.

F. W. HOWBERT, *Recorder.*

121 (The foregoing mining deed was endorsed as follows:)
No. —. Mining deed. J. B. Winchell and E. W. McNeal to C. E. Hudson, State of Colorado, county of ——, *ss.* I hereby certify that this deed was filed for record on the — day of ——, 1—, at — o'clock —. m. in my office, and duly recorded in Book —, page No. —. —— ——, recorder, by —— ——, deputy. Fee $—. The Out West Printing and Stationery Co., Colorado Springs, Colo.

(Attached to the foregoing mining deed was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, }
County of El Paso, } *ss:*

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain mining deed with additional title. J. B. Winchell *et al.* to C. E. Hudson, Filed for record in my office at 4:01 o'clock p. m. Feb'y 13, 1892, and duly recorded in Book No. 142, at page 111 of the records of this office. made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

122 (The foregoing certification endorsed as follows:)
Certificate of copy of —. Made from — record, page —, this — day of ——, A. D. 190–. —— ——.

[* Words and figure enclosed in brackets erased in copy.]

EXHIBIT 9, COMPLAINANT'S PROOFS.

(In ink :) s-c copy.

832. *Mining Deed, with Additional Title. J. M.* 2397.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

This indenture, made the eighth day of February in the year of our Lord one thousand eight hundred and ninety-two between J. B. Winchell and E. W. McNeal of the county of El Paso and State of Colorado, parties of the first part, and C. E. Hudson of the county of El Paso and State of Colorado, party of the second part, witnesseth :

That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable considerations [dollars],* in lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to — heirs and assigns.

One share in eight mining claims being an undivided one thirty-second (1/32) interest in the following claims. The "Hillside," the "East Lynne," the "Sunset," the "Ocean Wave," the "Snow Flake," the "Little Doc," the "Little Mary," and the "Evening Twilight," all located in Cripple Creek mining district and formerly owned by Winchell and McNeal and more particularly described in location certificates duly recorded on the records of El Paso county, Colorado.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident appendant, and appurtenant, or therewith usually had
123 and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in any wise appertaining, and the rents, issues, and profits thereof and also all the estate, right, title, interest, property possession, claim, and demand whatsoever as well in law as in equity of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances;

[* Word enclosed in brackets erased in copy.]

and the said —— —— part- of the first part, for — heirs, executors and administrators, do hereby covenant with the said part- of the second part, — heirs and assigns; that the said part- of the first part at the request of the said part- of the second part — heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all and every such further and other acts, conveyances and assurances in the law for the better assuring the said part- of the second part — heirs and assigns, of the premises, in manner as above conveyed or mentioned, and intended to be conveyed, as by the said part- of the second part — heirs and assigns, or — counsel learned in the law, shall be reasonably advised and required.

To have and to hold, all and singular, the said premises, together with all the appurtenances and privileges thereto incident, unto the said party of the second part — heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. B. his x mark. WINCHELL. [SEAL.]

E. W. McNEAL. [SEAL.]

Signed, sealed, and delivered in presence of

—— ——.

Witness to mark.
H. E. BASSETT.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
County of El Paso, }

I, H. E. Bassett, a notary public in and for said county, in the State aforesaid, do hereby certify that J. B. Winchell and E. W. McNeal, who are personally known to me to be as the persons whose name- foregoing are subscribed to the annexed deed, appeared before me this 124 day in person, and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 8th day of February, A. D. 1892.

[Matter enclosed between rules erased in copy.]

My commission expires Oct. 24th, 1895.

H. E. BASSETT,
Notary Public.

Filed for record the 8 day of Feb'y A. D. 1892, at 3:35 o'clock p. m.

[NOTARIAL SEAL.] F. W. HOWBERT, *Recorder.*

(The foregoing mining deed was endorsed as follows:)

No. —. Mining deed. J. B. Winchell and E. W. McNeal to C. E. Hudson. State of Colorado, county of ——, ss. I hereby certify that this deed was filed for record on the — day of —— 1— at — o'clock — m. in my office, and duly recorded in Book — page No. —. —— —— recorder. By —— —— deputy. Fee, $—. The Out West Printing and Stationery Co., Colorado Springs, Colo.

(Attached to the foregoing mining deed was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, }
County of El Paso, } ss:

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State do hereby certify that the within and foregoing is a full, true, and correct copy of a certain mining deed with
125 additional title. J. B. Winchell *et al.* to C. E. Hudson. Filed for record in my office at 3:35 o'clock p. m. Feb. 8, 1892, and duly recorded in Book No. 142, at page 97, of the records of this office.
made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:)

Certificate of copy of — made from record, page —, this — day of —— A. D. 190–. —— ——.

Exhibit 10, Complainant's Proofs.

No. 832. *Mining Deed, with Additional Title.* *J. M.* 2397.

The Gazette Printing Co., printers and manufacturing stationers, Colorado Springs, Colo.

This indenture, made the 23rd day of March in the year of our Lord one thousand eight hundred and ninety-two between H. E. Bassett, D. P. Sill, J. B. Winchell, E. W. McNeal, C. V. Potts, [O. Schuessels,]* H. T. Cooper, J. T. Estill, [Tho's B. Reeves,]* G. M. Carter, H. M. Fitzhugh, H. C. Shimp & [C. E. Hudson]* of the county of El Paso and State of Colorado, parties of the first part, and the Creede and Cripple Creek Mining and Milling Co. of the county of El Paso and State of Colorado, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of four hundred thousand—100 dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed and by these presents do grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the
126 second part, and to their heirs and assigns the following described mining claims, to wit: The "Hillside" lode, the "East Lynne" lode, "the Sunset" lode, "the Ocean Wave" lode the "Little Doc" lode, the "Little Mary" lode, the "Snow Flake" lode, & the "Evening Twilight" lode, all located in Cripple Creek mining district and more particularly described by location certificates duly recorded in the records of El Paso county, Colorado.

The aforesaid claims were located by J. B. Winchell and E. W. McNeal, and location certificates are recorded as follows: The Hillside lode in Book 2 at page 18, filed Jan. 14th, 1892. The East Lynne lode, filed for record Jan. 14th, 1892—in Book 2, page 18 The Little Doc lode, filed for record Feb'y 1st, 1892, in Book 2, at page 111. The Little Mary lode, recorded Feb'y 1st, 1892, in Book 2, at page 113. The Ocean Wave lode, recorded Feb'y 1st, 1892, in Book 2, at page 113, the Snowflake lode, recorded Feb'y 1st, 1892, in Book 2, at page 112, the Sunset lode, recorded Jan. 14th, 1892, in Book 2, at page 17 and the Evening Twilight lode, recorded, Feb'y 1st, 1892, in Book 2, page 112. All the above named lode mining claims are recorded on the records of El Paso county, Colorado.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein,

---

[* Words enclosed in brackets erased in copy.]

and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances, thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim, and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances; and the said above named parties of the first part, for their heirs, executors, and administratiors, do hereby covenant with the said party of the second part, its heirs and assigns; that the said parties of the first part at the request of the said parties of the second part its heirs or assigns, shall and will from time to time and at all times hereafter execute, acknowledge, and deliver, or cause to be executed, acknowledged, and delivered, all and every such further and other acts, conveyances, and assurances in the law for the better assuring the said party of the second part its heirs and assigns of the premises in manner as above conveyed or mentioned, and intended to be conveyed as by the said party of the second part its heirs and assigns, or its counsel learned in the law, shall be reasonably advised and required.

127 To have and to hold, all and singular, the said premises together with all the appurtenances and privileges thereto incident, unto the said party of the second part its heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed)	H. E. BASSETT.	[SEAL.]
"	D. P. SILL.	[SEAL.]
"	J. T. ESTILL.	[SEAL.]
"	E. W. McNEAL.	[SEAL.]
"	J. B. x WINCHELL. (his mark.)	[SEAL.]
"	H. M. FITZHUGH.	[SEAL.]
	H. C. SHIMP.	[SEAL.]
	C. V. POTTS.	[SEAL.]
	H. T. COOPER.	[SEAL.]
	G. M. CARTER.	[SEAL.]

Signed, sealed, and delivered in presence of—

Witness to mark of J. B. Winchell:
(Signed) THOMAS DONNELD.

(On back of foregoing document was the following:)

STATE OF COLORADO, }
County of El Paso, } ss:

I, Ira Harris, a notary public in and for said county, in the State aforesaid, do hereby certify that H. E. Bassett, D. P. Sill, J. T.

Estill, E. W. McNeal, J. B. Winchell, George M. Carter, H. M. Fitzhugh, H. C. Shimp, C. V. Potts, and H. T. Cooper, personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 23rd day of March, A. D. 1892.

(Signed) IRA HARRIS,
Notary Public.

(Stamped in red ink stamp:)
My commission expires February 13th, 1896.

[NOTARIAL SEAL.]

128 (The foregoing deed was endorsed as follows, to wit:)
No. —. Mining deed. H. E. Bassett *et al.* to the Creede and Cripple Creek Mining and Milling Co. State of Colorado, county of El Paso, *ss.* I hereby certify that this deed was filed for record on the 23 day of M'ch, 1892, at 3.35 o'clock p. m. in my office, and duly recorded in Book 142, page No. 295. F. W. Howbert, recorder, by —— ——, deputy. Fee, $3.70. The Gazette Printing Company, Colorado Springs, Colo.

On page 77, part of this exhibit, in 9th line of first paragraph, the word "party" has evidently been written "parties" and then a "y" made over the "ies.")

EXHIBIT 11, COMPLAINANT'S PROOFS.

No. 119.

Mining Deed.

Printed and for sale by the News Printing Company, Denver, Colo.

This indenture, made the 25th day of May in the year of our Lord eighteen hundred and ninety-two between J. N. Bartels of the county of El Paso, and State of Colorado, party of the first part, and [of]* the Creede and Cripple Creek Mining and Milling Company county of El Paso, and State of Colorado, party of the second part: witnesseth:

That the said party of the first part for and in consideration of the sum of one hundred dollars, money of the United States of America, to him in hand paid by the said party of the second part,

[* Words enclosed in brackets erased in copy.]

the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do- grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns,

One undivided one thirty-second interest in and to the following described mining claims situated in the Cripple Creek or Womack mining district in El Paso county State of Colorado to wit the
129 Hillside lode. The Snow Flake lode. The East Lynne lode: The Little Doc lode: The Little Mary lode: The Ocean Wave lode: The Evening Twilight lode; The Sun Set lode: The location certificates of said above described lode claims are recorded upon the records of El Paso county Colorado as (follows): The Hillside & East Lynne lodes in Book 2 on page 18: The Snow Flake in Book 2 on page 112: The Little Doc lode in Book 2 on page 111: The Little Mary & Ocean Wave lodes in Book 2, on page 113: The Evening Twilight lode in Book 2 on page 112; The Sunset lodes in Book 2 on page 117:

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances, thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also, all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part of, in or to the said premises, and every part and parcel thereof with the appurtenances, and the said J. N. Bartels party of the first part for his heirs, executors, and administrators, does hereby covenant with the said party of the second part, his heirs and assigns, that the said party of the first part, at the request of the said party of the second part, his heirs or assigns, shall and will from time to time, and at all times hereafter, execute, acknowledge, and deliver, or cause to be executed, acknowledged, and delivered all and every such further and other acts, conveyances and assurances in the law for the better assuring the said party of the second part, his heirs and assigns, of the premises, in manner as above conveyed or mentioned, and intended to be conveyed as by the said party of the second part, his heirs and assigns, or his counsel learned in the law, shall be reasonably advised and required.

To have and to hold all and singular, the said premises, together with all the appurtenances and privileges thereto incident unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) J. N. BARTELS. [SEAL.]

Signed, sealed and delivered in the presence of

____ ____.

____ ____.

130 (On the back of the foregoing was the following:)

STATE OF COLORADO, } ss:
El Paso County, }

I, William L. Spell a notary public in and for said county, in the State aforesaid, do hereby certify that J. N. Bartels personally known to me to be the person whose (names) is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

I further certify that my commission expires May 6th, 1896.

Given under my hand and seal this 25th day of May, A. D. 1892.

[NOTARIAL SEAL.] (Signed) WILLIAM L. SPELL,
Notary Public.

(The foregoing document was endorsed as follows:)

No. —. Mining deed J. N. Bartels to the "Creede and Cripple-Creek" Mining & Milling Co. State of Colorado, El Paso county—ss. I hereby certify that this instrument was filed for record in my office at 3:05 o'clock p. m. Sept. 13, 1892, and is duly recorded in Book 153 page No. 232. (Signed) F. W. Howbert, recorder, ——, deputy. Fees, $1.00.

EXHIBIT 12, COMPLAINANT'S PROOFS.

No. 830.

Mining Deed.

The Gazette Printing Co., printers and manufacturing stationers, Colorado Springs, Colo.

This indenture, made the eighth day of April in the year of our Lord one thousand eight hundred and ninety-two, between C. E. Hudson of the county of El Paso and State of Colorado, party of the first part, and The Creede and Cripple Creek Mining and Milling Company, of the county of El Paso and State of Colorado, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of twenty thousand —/100 dollars, lawful money of the United States (*of the United States*) of America,
131 to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell remise, release, and forever quitclaim unto the said party of the second part, and to its heirs and assigns all interest which the said first (—) owns in the following eight lode mining claims, located in the Cripple Creek mining dis-

trict, El Paso county, Colorado, namely: The "Hillside" lode recorded Jan'y 14th, 1892 in Book 2 at page — the "East Lynne" lode, recorded Jan. 14th, 1892, in Book 2 at page — the "Little Doc" lode, recorded Feb'y 1st, 1892, in Book 2 at page — the "Little Mary" lode, recorded Feb'y 1st, 1892, in Book 2 at page — the "Ocean Wave" lode, recorded Feb'y 1st, 1892, in Book 2 at page — the "Sunset" lode recorded Feb'y 14th, (here "Jan. 14th" was evidently written and also "Feb'y 14th" and it looks as though "Feb'y 14th" was written last but is doubtful) 1892, in Book 2 at page — the "Snowflake" lode, recorded Feb'y 1st, 1892, in Book 2, at page — an- the "Evening Twilight" recorded Feb'y 1st, 1892, in Book 2, at page —.

All recorded on the records (*on the records*) of said El Paso county Colorado, and more particularly described in location certificates, duly recorded as above stated.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold, all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part its heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

(Signed) C. E. HUDSON. [SEAL.]

Signed seal- and delivered in presence of—

—— ——.

—— ——.

132 (On back of the foregoing document was the following·)

STATE OF CALIFORNIA, } ss:
County of Santa Clara, }

I, Wm. F. Foss, a notary public in and for said county, in the State aforesaid, do hereby certify that C. A. Hudson who is personally known to me to be the person whose name is subscribed to the foregoing deed, appeared before me this day in person and (acknowledge-) that she signed, sealed, and delivered the said instrument of writing as her free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal, this eighth day of April, A. D. 1892.

My commission expires Oct. 21st, 1892.
[NOTARIAL SEAL.] (Signed) WM. F. FOSS,
Notary Public.

(The foregoing deed was endorsed as follows, to wit:)
Mining deed from C. E. Hudson to the Creede and Cripple Creek Mining and Milling Company. State of Colorado, county of El Paso—*ss.* I hereby certify that this instrument was filed for record in my office at 9.45 o'clock a. m., Apr. 12th, 189–. And is duly recorded in Book 142 page No. 381. F. W. Howbert, clerk and recorder, (by —— ——, deputy.) Fee, $90. The Gazette Printing Company, Colorado Springs, Colo.

133 EXHIBIT 13, COMPLAINANT'S PROOFS.

S-C (in ink). Copy.

828. *Amended Location Certificate, Rev.* 1890.

Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } *ss:*
County of El Paso, }

Know all men by these presents: That the "Creede and Cripple Creek Mining and Milling Company the undersigned, have this third day of September 1892 [190]* amended, located and claimed, and by these presents do amend, locate, and claim, by right of discovery and amended location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with sec. 2409 of the General Laws of Colorado, and with local customs, laws, and regulations, fifteen hundred linear feet and horizontal measurement on the Ocean Wave lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with one hundred and fifty feet on each side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim, three hundred and ten (310) feet running N. 18° 30′ E. from center of discovery shaft and eleven hundred and ninety (1190) feet running S. 18° 30′ W. from center of discovery shaft said discovery shaft being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim in Cripple Creek mining district, county of El Paso and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 N. E. running 300 feet N. 71° 30′ W. to cor. No. 2; thence 1500 ft. S. 18° 30′ W. to cor. No. 3; thence 300 ft. S. 71° 30′ E. to cor. No. 4; thence 1500 ft. N. 18° 30′ E. to beginning. Said lode is situated in sec. 29, T. 15, S. R. 69 W. parallel

[* Figures enclosed in brackets erased in copy.]

with and immediately east of Little Mary lode, and its surface lines are defined by six substantial posts planted in the ground.

From N. W. cor. No. 2 the N. W. cor. No. 2 of Little Mary lode bears N. 71° 30′ W. dist. 300 ft. Whence S. E. cor. sec. 19 bears N. 18° W. dist. 2510 ft., variation 14° 30′ E.

This being the same lode originally located on the second day of January, 1892, and recorded on the first day of February, 1892, in Book 2, page 113, in the office of the recorder of El Paso
134 county, this further and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description or record.

THE CREEDE AND CRIPPLE CREEK
MINING AND MILLING COMPANY. [SEAL.]
R. W. ANDERSON, *President.* [SEAL.]
H. E. BASSETT, *Sec't'y.* [SEAL.]

Said lode was discovered the — day of —— A. D. 18—.
Attest: —— ——.

Date of [amended]* location, Jan. 2, A. D. [190]* 1892.
Date of amended certificate, Sept. third A. D. [190]* 1892.

STEVENS & CANTER, *Sur's.*

Filed for record the 13 day of Sept. A. D. 1892 at 3:02 o'clock p. m.
F. W. HOWBERT, *Clerk.*

(The foregoing document was endorsed as follows:)

Amended location certificate. On the Ocean Wave mining claim of Creede and C. C. M. & M. Co. in Cripple Creek mining district, —— county, State of Colorado. State of Colorado, county of —— *ss.* I hereby certify that this amended location certificate was filed for record in my office at — o'clock — m. —— — 190– and is duly recorded in Book — page —. —— —— recorder. By —— —— deputy. Fees, $— Out West Printing and Stationery Co., Colorado Springs.

135 (Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, }
County of El Paso, } *ss:*

[* Words and figures enclosed in brackets erased in copy.]

I, W. H. Reed county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain amended location certificate of the Ocean Wave Lode mining claim. Filed for record in my office at 3:02 o'clock p. m. Sept. 13, 1892, and duly recorded in Book No. 1 at page 147 of the records of this office, made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:)
Certificate of copy of — made from — record, page — — day of ——, A. D. 190–.

EXHIBIT 14, COMPLAINANT'S PROOFS.

S-C (in ink). Copy.

828. *Amended Location Certificate, Rev.* 1890.

Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents: That the "Creede and Cripple Creek Mining and Milling Company the undersigned, have this third day of September 1892 amended, located and claimed, and by these presents do amend, locate, and claim, by right of dis-
136 covery and amended location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with sec. 2409 of the General Laws of Colorado, and with local customs, laws, and regulations, fifteen hundred linear feet and horizontal measurement on the Little Mary lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with one hundred and fifty feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim, three hundred and ten (310) feet running N. 18° 30′ E. from center of discovery shaft and eleven hundred and ninety (1190) feet running

[* Word enclosed in brackets erased in copy.]

S. 18° 30′ W. from center of discovery shaft, said discovery shaft being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim in Cripple Creek mining district, county of El Paso and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 (N. E.) running 300 ft. N. 71° 30′ W. to cor. No. 2; thence 1500 ft. S. 18° 30′ W. to cor. No. 3; thence 300 ft. S. 71° 30′ E. to cor. No. 4; thence 1500 ft. N. 18° 30′ E. to beginning. Said lode is situated in sec. 29, T. 15, S. R. 69 W. and its surface lines are defined by six substantial posts planted in the ground. Said lode is parallel with and immediately on the west side of "Ocean Wave lode."

From the N. W. cor. No. 2 the sec. cor. of secs. 19, 20, 29 & 30 bears N. 18° W. dist. 2510 ft. Variation 14° 30′ E.

This being the same lode originally located on the second day of January, 1892, and recorded on the first day of February, 1892, in Book 2, page 113, in the office of the recorder of El Paso county, this further and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description or record.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY. [SEAL.]
R. W. ANDERSON, *President.* [SEAL.]
H. E. BASSETT, *Sec't'y.* [SEAL.]

Said lode was discovered the — day of —— A. D. 18—.
Attest: —— ——.

Date of [amended]* location, Jan. 2, A. D. [190]* 1892.
Date of amended certificate, Sept. third A. D. [190]* 1892.

STEVENS & CANTER, *Sur's.*

137 Filed for record the 13 day of Sept. A. D. 1892 at 3:01 o'clock p. m.

F. W. HOWBERT, *Clerk.*

(The foregoing document was endorsed as follows:)

Amended location certificate. On the Little Mary mining claim of Creede and C. Ck. M. & M. Co. in Cripple Creek mining district, —— county, State of Colorado. State of Colorado, county of ——, *ss.* I hereby certify that this amended location certificate was filed for record in my office at — o'clock — m. —— 190– and is duly recorded in Book — page —. —— —— recorder. By —— —— deputy. Fees, $—. Out West Printing and Stationery Co., Colorado Springs, Colo.

(Attached to the foregoing document was the following:)

[* Words and figures enclosed in brackets erased in copy.]

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs. Colo.

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain amended location certificate of the Little Mary Lode mining claim. Filed for record in my office at 3:01 o'clock p. m. Sept. 13, 1892, and duly recorded in Book No. 1 at page 147 of the records of this office, made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 20th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

138 (The foregoing certification endorsed as follows:)
Certificate of copy of — made from — Record, page — — day of —— A. D. 190–.

EXHIBIT 15, COMPLAINANT'S PROOFS.

(In pencil:) 5 744.

(Stamped in red ink:) L. E. Sherman, Colorado Springs, Colo.

(4–462.)

General Land Office, No. 23744. Mineral certificate, No. 338.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field notes of survey and the

[* Words enclosed in brackets erased in copy.]

certificate No. 338, of the register of the land office at Pueblo, in the State of Colorado, accompanied by other evidence whereby it appears that the Creede and Cripple Creek Mining and Milling Company did, on the fifth day of August, A. D. 1893, duly enter and pay for that certain mining claim or premises, known as the Ocean Wave and Little Mary Lode mining claims designated by the surveyor-general as lot No. 8192, embracing a portion of section twenty-nine, in township fifteen south of range sixty-nine west, sixth principal meridian in the Cripple Creek mining district, in the county of El Paso and State of Colorado, in the district of lands subject to sale at Pueblo and bounded, described, and platted as follows, with magnetic variation as hereinafter stated.

Beginning for the description of the Ocean Wave Lode claim at corner No. 1, a pine post seven inches square marked 11 / 8192, with mound of stone, from which the south quarter corner of section twenty-nine, in township fifteen south of range sixty-nine west, sixth principal meridian, bears south thirty degrees and fifty-eight minutes east four thousand and forty-five and six tenths feet distant; corner No. 2 of survey No. 7968, the Coriolanus Lode claim, bears south fourteen degrees and five minutes east four hundred
139 and seven and seventy-nine hundredths feet distant; corner No. 3 of survey No. 7822, the Eclipse Lode claim, bears north thirty-seven degrees and fifty-six minutes east two hundred and sixty-two and five hundredths feet distant, and discovery shaft bears south four degrees and thirty-nine minutes east three hundred and sixty-four feet distant.

Thence, first course, magnetic variation thirteen degrees and ten minutes east, south seventy-three degrees and seven minutes east, two hundred and ninety feet to corner No. 2.

Thence second course, magnetic variation thirteen degrees and ten minutes east, south seventeen degrees and fifty-eight minutes west three hundred and seventy-five and fifty-four hundredths feet intersect line 1–2 of said survey No. 7968 at south fifty-three degrees and forty minutes east seventy-seven and five tenths feet from corner No. 2; five hundred and sixty-one and thirty-one hundredths feet to corner No. 3.

Thence, third course, magnetic variation thirteen degrees and fifteen minutes east, north seventy-three degrees and seven minutes west one hundred and fifty feet intersect line 2–3 of said survey No. 7968 at south thirty-seven degrees and forty-two minutes west two hundred and twenty-six and thirty-two hundredths feet from corner No. 2; two hundred and ninety feet to corner No. 4.

Thence fourth course, magnetic variation thirteen degrees and fifteen minutes east, north seventeen degrees and fifty-eight minutes east five hundred and sixty-one and thirty-one hundredths feet to corner No. 1, the place of beginning; the survey of the lode as above described extending five hundred and sixty-one and thirty-one hundredths feet in length along said Ocean Wave vein or lode.

Beginning for the description of the Little Mary Lode claim at

corner No. 1, being identical with corner No. 1 of said Ocean Wave Lode claim.

Thence, first course, magnetic variation thirteen degrees and ten minutes east, north seventy-three degrees and seven minutes west two hundred and thirty-seven and nineteen hundredths feet intersect line 3–4 of said survey No. 7822, two hundred and sixty-two and thirty-two hundredths feet to corner No. 2 from which discovery shaft bears south fourteen degrees and thirty-two minutes east two hundred and sixty-eight and eight-tenths feet distant.

Thence, second course, magnetic variation thirteen degrees and ten minutes east, south nineteen degrees and twenty-four minutes west nineteen and nineteen hundredths feet intersect line 3–4 of said survey No. 7822; eight hundred and thirty-eight and twenty-
140 six hundredths feet intersect line 4–1 of survey No. 7476, the Carbonate Queen Lode claim, one thousand one hundred and sixty-one and sixty-three hundredths feet to corner No. 3.

Thence, third course, magnetic variation thirteen degrees and forty minutes east, south seventy-three degrees and seven minutes east one hundred and fifty feet intersect line 4–1 of said survey No. 7476; two hundred and fifteen and seventeen hundredths feet intersect line 2–3 of said survey No. 7968; two hundred and ninety-one and sixty-nine hundredths feet to corner No. 4.

Thence, fourth course, magnetic variation thirteen degrees and forty minutes east, north seventeen degrees and fifty-eight minutes east two hundred and eleven and ninety-three hundredths feet intersect line 2–3 of said survey No. 7968; five hundred and ninety-nine and three tenths feet to corner No. 4 of said Ocean Wave Lode claim; one thousand one hundred and sixty and eighty-one hundredths feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand one hundred and sixty-one and sixty-three hundredths feet in length along said Little Mary vein or lode. Expressly excepting and excluding from these presents all that portion of the ground, hereinbefore described, embraced in said mining claims or surveys Nos. 7476, 7822, and 7968, and also all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; the granted premises in said lot No. 8192 containing nine acres and eighty-five hundredths of an acre of land more or less.

Now know ye, that there is therefore hereby granted by the United States unto the said The Creede and Cripple Creek Mining and Milling Company and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Ocean Wave and Little Mary veins, lodes, or ledges, and of all other veins, lodes, and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 8192 extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises.

Provided, that the right of posseesion to such outside parts of said veins, lodes or ledges, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 8192, so continued in their own direction that
141 such planes will intersect such exterior parts of said veins, lodes, or ledges: And provided further that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to its successors and assigns forever; subject nevertheless to the above mentioned and to the following conditions and stipulations.

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-first day of December in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
Recorder of the General Land Office.

Recorded Vol. 242, pages 356 to 360 inclusive.

142 (The foregoing document was endorsed as follows:)
3658. M. E. 338. Ocean Wave and Little Mary lodes

State of Colorado, county of El Paso—ss. I hereby certify that this instrument was filed for record in my office at 3.20 o'clock p. m., March 10, 1894, and is duly recorded in Book 173, page 16. F. W. Howbert, recorder. 1.50 pd. Filed Mar. 21, 1898. Robert Bailey, clerk. Robert Bailey clerk. (in pencil) for compl't.

DEFENDANT'S EXHIBITS.

EXHIBIT A, DEFENDANT'S PROOFS.

This exhibit is a map and is separate from the bill of exceptions, being too large to be bound herewith.

EXHIBIT B, DEFENDANT'S PROOFS.

Y-R (in red ink.) Copy.

No. 53139.

Location Certificate Uinta Tunnel No. 23 Lode by Jas. Doyle.

Filed for Record at 11.30 a. m., Mar. 2, 1898. W. T. Liggett, Recorder.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents, that we, The Uinta Tunnel Mining and Transportation Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa and a citizen of the State of Iowa, and of the United States, claims by right of discovery and by right of location, fifteen hundred (1500) feet linear and horizontal measurement on the Uinta Tunnel No. 23 lode, along the vein thereof, with all its dips, spurs, angles, and variations, together with the amount of surface necessary for working the same, and allowed by law, to wit: 150 ft. on each side of discovery, 1200 feet of said lode so located lying and being S. 50° 30′ E. of the discovery of said lode and 300 feet being N. 50° 30′ W. of said discovery, said lode being more particularly described as follows, to wit:

Beginning at a point in the Uinta tunnel, a tunnel owned by the undersigned, The Uinta Tunnel Mining and Transportation Company, and duly located and prosecuted under and in pursuance of section 2323 of the Revised Statutes of the United States 1921 feet from the face of said tunnel, and extending from said point 1200 feet S. 50° 30′ E. and 300 feet N. 50° 30′ W. the bearing of said lode is about N. 50 degrees 30′ W. This lode was discovered in the said Uinta tunnel and is claimed under the provisions of section
143 4 of an act of Congress approved May 10, 1872, and being section 2323 of the Revised Statutes of the United States, and

all acts amendatory thereof, in the Cripple Creek mining district' county of El Paso, and State of Colorado.

Said lode was discovered and was located on the 18th day of December, A. D. 1897. And the said Uinta Tunnel Mining and Transportation Company claims priority of title to and right of possession of said vein, lode, ledge, and deposit, with its dips, spurs, and angles, to the extent above defined as of and from the 13th day of January, A. D. 1892, the day when said tunnel site location of said Uinta tunnel was originally made, and so claims the same by virtue of a full compliance with the statutes of the United States, and of the State of Colorado, with reference to the making of tunnel site locations under section 2323 of the Revised Statutes of the United States.

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO.,
By JAMES DOYLE, *President.*

Attest: THOMAS J. MALONEY, *Secretary.*

Tunnel located, Jan'y 13, 1892.
Lode cut and discovered Dec. 18, 1897.
Date of location Dec. 18, 1897.
Date of certificate February 25, 1898.

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Uinta Tunnel No. 23 lode. Filed for record in my office at 11:30 o'clock a. m. March 2, 1898, and duly recorded in Book No. 278, at page 18 of the records of this office made from the original [paper.]* record.

144 In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this sixteenth day of January, A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

[* Word enclosed in brackets erased in copy.]

(The foregoing certification endorsed as follows:)
Certificate of copy of — made from — record, page — this — day of —— A. D. 190–.

EXHIBIT C, DEFENDANT'S PROOFS.

Y-R. (in red ink). Copy.

No. 53140.

Location Certificate, Uinta Tunnel No. 24 Lode, by Jas. Doyle.

Filed for Record at 11:31 a. m. March 2, 1898. W. T. Liggett, Recorder.

STATE OF COLORADO, } ss:
County of El Paso. }

Know all men by these presents, that we, The Uinta Tunnel Mining and Transportation Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, and a citizen of the State of Iowa, and of the United States, claims by right of discovery and by right of location fifteen hundred (1500) feet linear and horizontal measurement on the Uinta Tunnel No. 24 lode along the vein thereof, with all its dips, spurs, angles and variations, together with the amount of surface necessary for working the same and allowed by law, to wit: 150 ft. on each side of discovery 750 feet of said lode so located lying and being S. 79° 0′ E. of the discovery of said lode and 750 feet being N. 79° 0′ W. of said discovery, said lode being more particularly described as follows, to wit:

Beginning at a point in the Uinta tunnel, a tunnel owned by the undersigned, The Uinta Tunnel Mining and Transportation Company, and duly located and prosecuted under and in pursuance of section 2323 of the Revised Statutes of the United States
145 2102 5/ feet from the face of said tunnel, and extending from said point 750 feet S. 79° E. and 750 feet N. 79° W. the bearing of said lode is about S. 79 degrees E. This lode was discovered in the said Uinta tunnel, and is claimed under the provisions of section 4 of an act of Congress approved May 10, 1872, and being section 2323 of the Revised Statutes of the United States and all acts amendatory thereof in the Cripple Creek mining district, county of El Paso and State of Colorado.

Said lode was discovered and was located on Dec. 23rd, A. D. 1897. And the said Uinta Tunnel, Mining and Transportation Company claims priority of title to and right of possession of said vein, lode, ledge, and deposit, with its dips, spurs, and angles, to the extent above defined as of and from the 13th day of January, A. D. 1892, the day when said tunnel site location of said Uinta tunnel

was originally made, and so claims the same by virtue of a full compliance with the statutes of the United States, and of the State of Colorado, with reference to the making of tunnel site locations under section 2323 of the Revised Statutes of the United States.

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO.,
By —— ——, *President.*

Attest: THOMAS J. MALONEY, *Secretary.*

Tunnel located Jan'y 13, 1892.
Lode cut and discovered Dec. 23, 1897.
Date of location Dec. 23, 1897.
Date of certificate Feb'y 25, 1898.

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Uinta Tunnel No. 24 lode. Filed for record in my office at 11.31 o'clock a. m. March 2, 1898, and duly recorded in Book No. 278, at page 19 of the records of this office. made from the original [paper.]* record.

146 In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this sixteenth day of January, A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:)
Certificate of copy of — made from — record, page —, this — day of —— A. D. 190–.

EXHIBIT D, DEFENDANT'S PROOFS.

Y-R (in red ink). Copy.

[* Word enclosed in brackets erased in copy.]

No. 53141.

Location Certificate, Uinta Tunnel No. 25 Lode, J. Doyle.

Filed for Record at 11.32 a. m., March 2, 1898. W. T. Liggett, Recorder.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents, that we, The Uinta Tunnel Mining and Transportation Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, and a citizen of the State of Iowa, and of the United States, claims by right of discovery and by right of location, fifteen hundred (1500) feet linear and horizontal measurement on the Uinta Tunnel No. 25 lode along the vein thereof, with all its dips, spurs, angles, and variations, together with the amount of surface necessary for working the same and allowed by law, to wit: 150 ft. on each side of the discovery; 750 feet of said lode so located lying and being N. 26° 15′ W. of the discovery of said lode and 750 feet being S. 26° 15′ E. of said discovery, said lode being more particularly described as follows, to wit:

Beginning at a point in the Uinta tunnel, a tunnel owned by the undersigned, The Uinta Tunnel, Mining and Transportation Company and duly located and prosecuted under and in pursu-
147 ance of section 2323 of the Revised Statutes of the United States 2118 feet from the face of said tunnel, and extending from said point 750 feet N. 26° 15′ W. and 750 feet S. 26° 15′ E. the bearing of said lode is about N. 26 degrees 15′ W.

This lode was discovered in the said Uinta tunnel and is claimed under the provisions of section 4 of an act of Congress approved May 10, 1872, and being section 2323 of the Revised Statutes of the United States, and all acts amendatory thereof, in the Cripple Creek mining district, county of El Paso and State of Colorado.

Said lode was discovered and was located on the 6th day of January, A. D. 1898.

And the said Uinta Tunnel, Mining and Transportation Company claims priority of title to and right of possession of said vein, lode, ledge, and deposit with its dips, spurs, and angles, to the extent above defined, as of and from the 13th day of January, A. D. 1892, the day when said tunnel site location of said Uinta tunnel was originally made, and so claims the same by virtue of a full compliance with the statutes of the United States, and of the State of Colorado, with reference to the making of tunnel site locations under section 2323 of the Revised Statutes of the United States.

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO.,
By JAMES DOYLE, *President.*

Attest: THOMAS J. MALONEY, *Secretary.*

Tunnel located Jan'y 13, 1892.
Lode cut and discovered Jan'y 6, 1898.
Date of location Jan'y 6, 1898.
Date of certificate Feb'y 25, 1898.

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Outwest Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Uinta Tunnel No. 25 lode. Filed for record in my office at
148 11:32 a. m. March 2, 1898, and duly recorded in Book 278 at page 20 of the records of this office. made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this sixteenth day of January, A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:)
Certificate of copy of — made from — record, page — this — day of —— A. D. 190–.

EXHIBIT E, DEFENDANT'S PROOFS.

Y-R (in red ink). Copy.

No. 53142.

Location Certificate, Uinta Tunnel No. 26 Lode. Jas. Doyle.

Filed for Record at 11:33 a. m. March 2, 1898. W. T. Liggett, Recorder.

[*Word enclosed in brackets erased in copy.]

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents, that we, The Uinta Tunnel Mining and Transportation Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, and a citizen of the State of Iowa, and of the United States, claims by right of discovery and by right of location, fifteen hundred (1,500) feet linear and horizontal measurement on the Uinta Tunnel No. 26 lode, along the vein thereof, with all its dips, spurs, angles, and variations, together with the amount of surface necessary for working the same and allowed by law, to-wit: 150 ft. on each side of the discovery 1000 feet of said lode so located lying and being N. 11° 45′ W. of the discovery, of said lode and 500 feet being S. 11° 45′ E. of said discovery, said lode being more particularly described as follows, to wit:

(Be-ing) at a point in the Uinta tunnel, a tunnel owned by the undersigned, the Uinta Tunnel, Mining and Transportation
149 Company, and duly located and prosecuted under and in pursuance of section 2323 of the Revised Statutes of the United States 2181 feet from the face of said tunnel, and extending from said point 1000 feet N. 11° 45′ W. and 500 feet S. 11° 45′ E. The bearing of said lode is about S. 11 degrees 45′ E. This lode was discovered in the said Uinta tunnel, and is claimed under the provisions of section 4 of an act of Congress approved May 10, 1872, and being section 2323 of the Revised Statutes of the United States, and all acts amendatory thereof, in the Cripple Creek mining district, county of El Paso and State of Colorado.

Said lode was discovered and was located on the 15th day of December, A. D. 1897, and the said Uinta Tunnel, Mining and Transportation Company claims priority of title to and right of possession of said vein lode ledge and deposit, with its dips, spurs, and angles to the extent above defined, as of and from the 13 day of January, A. D. 1892, the day when said tunnel site location of said Uinta tunnel was originally made, and so claims the same by virtue of a full compliance with the statutes of the United States and of the State of Colorado, with reference to the making of tunnel site locations under section 2323 of the Revised Statutes of the United States.

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO.,
By JAMES DOYLE, *President.*

Attest: THOMAS J. MALONEY, *Secretary.*

Tunnel located Jan'y 13, 1892.
Lode cut and discovered Dec. 15, 1897.
Date of location Dec. 15, 1897.
Date of certificate Feb'y 25, 1898.

(Attached to the foregoing document was the following:)
18—219

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Uinta Tunnel No. 26 lode. Filed for record in my office at
150 11:33 o'clock a. m. March 2, 1898, and duly recorded in Book No. 278, at page 20 of the records of this office. made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this sixteenth day of Jan. A. D. 1902.

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

[Seal El Paso County, Colorado.]

(The foregoing certification endorsed as follows:)
Certificate of copy of — made from — record, page — this — day of —— A. D. 190–.

EXHIBIT F, DEFENDANT'S PROOFS.

Y–R. (in red ink). Copy.

Location Certificate, Uinta Tunnel Claim, to W. R. Mason et al.

Filed for Record at 8:37 a. m., February 25, 1892. F. W. Howbert, Recorder.

Location certificate Uinta Tunnel claim.

Know all men by these presents, that the undersigned citizens of the United States, have this eighteenth day of February, 1892, claimed by right of location a tunnel claim for the purpose of discovering and working veins, lodes or deposits on the line thereof (cutting the Eclipse lode and working the Eclipse lode) said tunnel claim is situated in the Cripple Creek mining district county of El Paso, State of Colorado, and the location and bounds of said tunnel are staked on the surface at the place of commencement and termi-

[* Word enclosed in brackets erased in copy.]

nation thereof as well as along the line thereof, said claim is more particularly described as follows:

Beginning at corner No. 1 being the N. E. corner; whence an aspen tree 8 inches in diameter bears S. 55° E. distant 43 feet; thence S. 39° 30′ W. (750) seven hundred and fifty feet to commencement of tunnel; thence same course (750) seven hundred and fifty feet to corner No. 2 whence a spruce tree 14 inches
151 in diameter bears N. 87° W. distant 12 feet; thence S. 50° 30′ E. (3000) three thousand feet to corner No. 3; thence N. 39° 30′ E. (750) seven hundred and fifty feet to termination of said (tcunnel); thence same course (750) seven hundred and fifty feet to corner No. 4; thence N. 50° 30′ W. (3000) three thousand feet to place of beginning. On the end lines posts are set at each 375 feet and on the side line between corners No. 2 and 3 post- are set at each 330 feet and marked the distance from the N. W. corner No. 2 and between corners numbered 4 and 1 posts are set at each 330 feet and the distance marked from corner No. 4, S. E. cor. from the N. E. corner No. 1 the section corner to section- 18, 20, 29, 30 bears N. 34° W. distant 1275 feet being a part of sections 29 and 30, township 15 south range 69 west of the sixth principal meridian. Variation 14° 30′ east.

W. R. MASON. [SEAL.]
WM. E. HALL. [SEAL.]
HERMAN TEITJA. [SEAL.]

STATE OF COLORADO, } ss:
El Paso County, }

William E. Hall being by me first duly sworn on his oath says he is one of the parties whose names appear in the above location certificate; that on the 13″ day of Jan'y, 1892, affiant together with W. R. Mason and Herman Teieja the co-owners of the above claim located the above tunnel site by posting in a conspicuous place and at the entrance of said tunnel a notice in writing of their intention to claim and work said tunnel site; that they, the above named parties have performed work in said tunnel to the value of $270.00 in driving said tunnel and $80.00 in furnishing and putting in the timbers in said tunnel; that it is *bona fide* the intention of this affiant to prosecute the work on this tunnel with diligence and dispatch for the discovery of veins or lodes and for mining purposes.

Subscribed and sworn to before me this 20 day of Feb'y, 1892.

[NOTARIAL SEAL.] JOHN F. DOWNELL,
Notary Public.

My commission expires Jan. 20, 1896.

(Attached to the foregoing document was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the afore-
152 said county and State do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Uinta Tunnel claim. Filed for record in my office at 8.37 o'clock a. m. February 25, 1892, and duly recorded in Book No. 79 at page 492 of the records of this office. made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this sixteenth day of January, A. D. 1902.

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

[Seal El Paso County, Colorado.]

(The foregoing certification — endorsed as follows:)
Certificate of copy of — made from — record, page —, this —day of —— A. D. 1900.

EXHIBIT G, DEFENDANT'S PROOFS.

Y–R. (in red ink). Copy.

827. *Location Certificate.*

The Outwest Printing and Stationery Co., Colorado Springs, Colo.

34502.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents, that Vance Carothers the undersigned has this 2nd day of February, 1897, 190– located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the mining acts of Congress approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations 1500 linear feet and horizontal measurement on the Black Jasper lode, vein, ledge, or deposit, along

[* Word enclosed in brackets erased in copy.]

the vein thereof, with all its dips, angles, and variations, as allowed by law, together with 150 feet on the north [feet on each]* side of the middle of said vein, at the surface, so far as can be determined from present developments; and all veins, lodes,
153 ledges, or deposits and surface ground, within the lines of said claim 30 feet running S. (N. is written in lead pencil over this) 61° 14′ E. (W. is written in lead pencil over this) from center of discovery shaft, and 1470 feet running N. (S. is written in lead pencil over this) 61° 14′ W. (E. is written in lead pencil over this) from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim, in the Cripple Creek mining district, county of El Paso and State of Colorado, described by metes and bounds as follows, to wit:

side and 150 feet on the south

Beginning at corner No 1 (the N. E. cor.) thence N. 61° 14′ W. 1500 ft. to N. W. cor. No. 2; thence S. 4° 46′ W. 328.4 ft. to S. W. cor. No. 3; thence S. 61° 14′ E. 1500 ft. to S. E. cor. No. 4; thence N. 4° 46′ E. 328.4 ft. to N. E. cor. No. 1 the place of beginning cor. No. 4 of Sur. No. 8673 Little Harry lode bears N. 38° 57′ W. distant 173 ft. from S. E. cor. No. 4 of claim Nipple mountain bears S. 6° 06′ E. from S. E. cor. No. 4 of claim.

Big Bull mountain bears S. 83° 25′ E. from S. E. cor. No. 4 of claim.

Variation 13° 30′ east.

VANCE CAROTHERS. [SEAL.]

Said lode was discovered on the 30th day of January, A. D. [190]* 1897.

Attest: —— ——.

1897.

Date of location, Jan'y 30th, A. D. [190–]*

Date of certificate, February 2nd, A. D. [190–]* 1897.

Filed for record the 2 day of Feb. A. D. 1897 at 2:40 o'clock p. m.

J. W. BATES, *Clerk.*

(The foregoing document was endorsed as follows:)

Location certificate on the —— mining claim of —— in —— mining district —— county, State of Colorado. State of Colorado, county of —— *ss.* I hereby certify that this location certificate was filed for record in my office at — o'clock — m. — 190– and is duly recorded in Book — at page —. —— —— recorder, by —— —— deputy. Fees, $—.

154 (Attached to the foregoing location certificate was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

[* Words and figures enclosed in brackets erased in copy.]

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Black Jasper Lode mining claim. Filed for record in my office at 2:40 o'clock p. m. Feb. 2, 1897, and duly recorded in Book No. 34, at page 199 of the records of this office made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this sixteenth day of January, A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:)
Certificate of copy of — made from — record page — this — day of —— A. D. 190–.

EXHIBIT H, DEFENDANT'S PROOFS.

Y-R (in red ink). Copy.

827 c. *Location Certificate.*

Lode Claim—D. N. Form.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

Know all men by these presents, that we, S. P. Chalfant, Teitija, Wm. E. Hall and W. J. Chambers, of the county of El Paso, in the State of Colorado, claim by right of discovery and location 1500 feet linear and horizontal measurement on the Uinta Tunnel lode No. 1 [lode]* along the vein thereof with all its dips, variations and angles; together with 150 feet in width on each side of the middle of said vein at the surface; and all veins, lodes, ledges, deposits, and surface ground within the lines of said claim; 300 ft. *feet* on
155 said lode running N. 17° W. from the center of the discovery shaft, and 1200 feet running S. 17° E.; from said center of discovery shaft. [Said claim is situated on the]* — in Cripple Creek mining district, county of El Paso and State of Colorado and is bounded and described as follows:

Beginning at cor. No. 1 whence an aspen 12 ins. diam. bears N. 10° W. 10 ft.; thence S. 73° W. 300 ft. to cor. No. 2; whence an aspen 8 ins. diam. bears S. 11° W. 101.5 ft.; thence S. 17° E. 750 ft.

[* Word enclosed in brackets erased in copy.]

to stake 1500 ft. to cor. No. 3; whence an aspen 3" *ins.* diam. bears S. 10° E. 2 ft.; thence N. 73° E. 300 ft. to cor. No. 4 whence a spruce 12 ins. diam. bears west 15 ft.; thence N. 17° W. 750 ft. to stake 1500 ft. to cor. No. 4 the place of beginning.

Va. 13° 35′ E. Said lode is situate at southern head of Arequa gulch or near it. The north end stakes are in the gulch and lode claim runs almost to top of mountain on south of gulch.

S. P. CHALFANT. 3/24. [SEAL.]
HERM AN TEITIJA. 4/24. [SEAL.]
WM. E. HALL. 14/24. [SEAL.]
W. J. CHAMBERS. 3/24. [SEAL.]

Said lode was discovered on the 15th day of August, A. D. 1892.
Date of location, Sept. 2nd, A. D. 1892.
Date of certificate Sept. 2nd, A. D. 1892.
Attest: THOMAS WITHERS,
U. S. Dep. Min. Surveyor.

Filed for record the 11 day of Oct. A. D. 1892, at 3:46 o'clock p. m.

F. W. HOWBERT, *Clerk.*

(The foregoing document was endorsed as follows:)
Location certificate —— lode State of Colorado, county of —— ss. Office of county clerk and recorder: I hereby certify that the within instrument was filed in this office for record at — o'clock — m —— A. D. 1—, and was duly recorded in Book No. — page No. — —— —— recorder. —— —— deputy. Fees, $— The Out West Printing and Stationery Co., Colorado Springs, Colo.

156 (Attached to the foregoing location certificate was the following:)

440—Special.

Certificate of Copy.

The Out West Printing and Stationery Co., Colorado Springs, Colo.

STATE OF COLORADO, } ss:
County of El Paso, }

I, W. H. Reed, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain location certificate of the Uinta Tunnel lode No. 1, filed for record in my office at 3:46 p. m. Oct. 11, 1892, and duly recorded in Book No. 7 at page 22 of the records of this office. made from the original [paper.]* record.

In testimony whereof, I have hereunto set my hand and affixed

[* Word enclosed in brackets erased in copy.]

my official seal, at my office in Colorado Springs, in said county and State, this 27th day of Jan. A. D. 1902.

[Seal El Paso County, Colorado.]

(Signed) W. H. REED,
County Clerk and Recorder,
By —— ——, *Deputy.*

(The foregoing certification endorsed as follows:)
Certificate of copy of — Made from — record, page — this — day of —— A. D. 190–.

And the foregoing is all the evidence admitted or offered upon the trial of said cause.

Thereupon the defendant presented in writing the following requests for instructions to the jury:

If the jury believe from the evidence that defendant for more than a year prior to the time of instituting this action, was extending its tunnel through and beyond the property claimed by plaintiff, and that in so doing the defendant expended large sums of money for machinery and labor, and that all thereof was done with the full knowledge of plaintiff, and without any objection from or protest on the part of plaintiff, until long after defendant had driven the bore of its tunnel a distance of about twenty-two hundred
157 feet, when defendant discovered and uncovered a vein of ore in mineral on the line of its tunnel, not previously known to exist, and had commenced to mine, extract, ship, and sell rich and valuable ore and mineral therefrom, making no other or further claim to the Little Mary or Ocean Wave lode and mining claim, except the right of entry and exit through and along the bore of said tunnel, to said discovery so made as aforesaid, then you will find for the defendant.

Which instruction the court refused to give.

To which refusal of the court to give such instruction counsel for defendant then and there duly excepted.

The court instructs the jury as a matter of law, that there can be no location of a mining claim upon the public domain, until there has been a discovery of mineral thereon. The simple driving of a location stake, the marking of the claim, upon the ground, the survey making a location certificate and recording the same, is not sufficient. Until a vein in rock in place has been discovered, there is no valid discovery and no valid location can be made until such discovery. If the jury believe from the evidence in this case that the plaintiff or its grantors, had not made a discovery of mineral in its Little Mary and Ocean Wave lodes, prior to the location of the tunnel claimed by defendant, and you further believe from the evidence that the said tunnel, from the time of its location was being prosecuted with reasonable diligence, and that there was no failure to prosecute work on the tunnel for a period of six months, until after defendant was enjoined from working its said tunnel; that the

work on said tunnel was continuous, then and in such case you will find for the defendant.

Which instructions the court refused to give.

To which refusal of the court to give such instruction counsel for defendant then and there duly excepted.

If the jury believe from the evidence that there was no discovery of a vein of mineral in rock in place, made in the Little Mary and Ocean Wave lodes, or either of them, until after the location of the tunnel claimed by defendant, then and in such case it was not necessary, when application for patent for said Little Mary and Ocean Wave lodes, or either of them, was made for the owners of the tunnel, if such owners had not at that time reached the westerly side line of the Little Mary lode with the bore of its tunnel, to file an adverse claim in the United States Land Office and to commence a suit in support thereof to preserve the rights of such owners to the said tunnel.

Which instruction the court refused to give.

158 To which refusal of the court to give such instruction counsel for defendant then and there duly excepted.

If the jury believe from the evidence that defendant makes no claim to any vein, nor claims the right to follow or drive upon any vein, within the surface boundaries of the Little Mary and Ocean Wave lode- and mining claims, or either of them, and that the defendant is the owner of the Uinta tunnel mentioned and described in the pleadings, and that the mouth of said tunnel was and is located upon ground owned and in the lawful possession of defendant, then and in such case, under and by virtue of section one of chapter sixty-two of the Session Laws of the State of Colorado, for the year 1897, defendant has the right to drive and continue its tunnel through and across said Little Mary and Ocean Wave lode- and mining claims, and each thereof, and to use the bore of said tunnel only for entry and exit to remove ore and mineral from properties beyond said Little Mary and Ocean Wave lode- and mining claims that defendant might own.

Which instruction the court refused to give.

To which refusal of the court to give such instruction counsel for defendant then and there duly excepted.

Thereupon the court upon its own motion instructed the jury as follows:

Gentlemen of the jury, under the issues in this case, the plaintiff is entitled as a matter of law to recover possession of the property claimed in the complaint. Under the issues as they come before the court upon the trial, the court is obliged to exclude the testimony on the part of the defendant, and you are therefore instructed to return a verdict in favor of the plaintiff for possession of the premises described in the complaint.

To the giving of which instruction counsel for defendant then and there duly excepted.

Thereupon the following verdict was returned by the jury without retiring from the room:

We, the jury, in the above entitled cause, upon our oath do say: We find the issues herein joined in favor of the plaintiff, and that it is the owner and entitled to the possession of the premises in its complaint set forth and described.

ADOLPHUS FRED ROBERTS, *Foreman.*

To the rendition and reception of said verdict the defendant then and there, and at the time duly excepted.

159 Be it further remembered that afterwards and on the 31st day of January, 1902, the defendant, The Uinta Tunnel Mining and Transportation Company, filed its motion for a new trial herein, which said motion is in the words and figures following, to wit:

Now comes the above named defendant and moves the court for a new trial herein, for the following reasons, to wit:

1. Because the court erred in excluding evidence as to the location of the Uinta tunnel.

2. Because the court erred in excluding evidence as to the location and discovery of the Uinta Tunnel No. 23 lode.

3. Because the court erred in excluding evidence as to the location of the Uinta Tunnel No. 24 lode.

4. Because the court erred in excluding evidence as to location of the Uinta Tunnel No. 25 lode.

5. Because the court erred in excluding evidence as to the location of the Uinta Tunnel No. 26 lode.

6. Because the court erred in excluding evidence as to the location of the Uinta Tunnel No. 1 lode.

7. Because the court erred in excluding evidence in reference to the Black Jasper lode.

8. Because the court erred in excluding evidence in reference to the continuity of the work upon the Uinta tunnel, and in excluding evidence offered to prove that the Uinta tunnel had been prosecuted with diligence from the time of its location until the owners thereof were enjoined by the Federal court from further driving the bore of said tunnel.

9. Because the court erred in excluding evidence offered to show that the locators of the Uinta tunnel went upon the unappropriated and unoccupied public domain of the United States, in November, 1891, and started to work thereon, and that the survey of the said location was not made until the eighteenth day of February, 1892.

10. Because the court erred in excluding the evidence offered to prove that there was no discovery of ore or mineral in the discovery shaft of the Ocean Wave Lode mining claim, or within the surface boundaries of said claim, for more than a year after the date of the location certificate of the Uinta tunnel.

11. Because the court erred in excluding the evidence offered to prove that there was no discovery of ore or mineral in the
160 discovery shaft of the Little Mary Lode mining claim, or within the surface boundaries of said claim, for more than a

year after the date of the location certificate of the Uinta tunnel.

12. Because the court erred in refusing to permit the defendant to prove that there had been expended by the defendant its grantors more than the sum of sixty-five thousand dollars in machinery and work and labor in driving the bore of the Uinta tunnel, after the same had passed beyond the easterly side lines of the Ocean Wave and Little Mary Lode mining claims.

13. Because the court erred in not permitting the defendant to prove that the bore of the tunnel was driven through the Ocean Wave and Little Mary Lode mining claims by and with the consent and acquiescence of the officers and directors of the plaintiff.

14. Because the court erred in not permitting the defendant to prove that the present officers and owners of the plaintiff's properties purchased the control thereof for the purpose of annoying and harrassing the defendant and its grantor, and preventing the removal of ore that had been uncovered and discovered on the bore of the tunnel, a distance of more than eleven hundred feet from the easterly side line of said Little Mary and Ocean Wave Lode mining claims.

15. Because the court erred in rejecting the testimony that was offered by the defendant to prove the issues made by the pleadings in the case.

16. Because the court erred in receiving in evidence the location certificates of the Ocean Wave and Little Mary Lode mining claims over the objection of the defendant.

17. Because the court erred in receiving in evidence the patent issued upon the Ocean Wave and Little Mary Lode mining claims, offered in evidence by the plaintiff, over the objection of the defendant.

18. Because the court erred in receiving in evidence the amended location certificate of the Ocean Wave and Little Mary Lode mining claims, offered by the plaintiff, over the objection of the defendant.

19. Because the court erred in instructing the jury to return a verdict for the plaintiff.

20. Because the court erred in receiving the verdict of the jury, over the objection of the defendant.

161 21. Because the court erred in receiving the evidence offered on behalf of the plaintiff, and in rejecting the evidence offered on behalf of the defendant.

22. Because the court erred in the law, in this, by instructing the jury to find a verdict for the plaintiff.

23. Because the court erred in refusing to give to the jury instruction No. 1, asked by the defendant.

24. Because the court erred in refusing to give to the jury instruction No. 2, asked by the defendant.

25. Because the court erred in refusing to give to the jury instruction No. 3, asked by the defendant.

26. Because the court erred in refusing to give to the jury instruction No. 4, asked by the defendant.

27. Because the verdict of the jury should have been for the defendant and against the plaintiff.

"C. J. HUGHES, JR.,
SCOTT ASHTON,
Attorneys for Defendant.

Be it further remembered, that afterwards and on the 4th day of March, 1902, the above and foregoing motion came on for hearing and after argument thereon, the court having considered same and being well advised in the premises overruled said motion.

To which order and judgment of the court in overruling said motion the defendant then and there and at the time duly excepted.

Thereupon the court rendered a judgment on the verdict of the jury, which said judgment is in the words and figures following, to wit:

It is ordered by the court, for good and sufficient reason to the court appearing, that said motion be and the same is hereby overruled, and thereupon, on motion of the defendant, it is ordered by the court that the defendant have day and including thirty (30) days from this day within which time to file herein a bill of the exceptions reserved by it upon the trial of the issues herein joined, and cost bond on writ of error shall be in the sum of three hundred dollars ($300).

To the rendition of said judgment and to each and every part and portion thereof the defendant then and there and at the time duly excepted.

162 Thereupon the court gave the said defendant thirty (30) days in which to prepare and tender its bill of exceptions from this date, and find bond in the sum of three hundred dollars for appeal.

And inasmuch as the foregoing matters do not otherwise sufficiently appear of record, the defendant, The Uinta Tunnel Mining and Transportation Company, now here tenders this its bill of exceptions and prays that the same may be signed, sealed, and made a part of the record; which is done accordingly this 4th day of March, A. D. 1902.

JOHN A. RINER, *Judge.*

Approved:

H. H. LEE,
Counsel for Plaintiff.

Endorsed: No. 3658. United States of America, district of Colorado. In the circuit court. The Creede and Cripple Creek Mining and Milling Company *v.* The Uinta Tunnel Mining and Transportation Company. Bill of exceptions. Filed Mar. 4, 1902. Robert Bailey, clerk.

In the United States Circuit Court of Appeals for the Eighth Circuit.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error and alleges that there was manifest error in the ruling of the court on the pleadings, in the conduct and trial of said cause, in the judgment rendered therein, in the proceedings had in the taking of testimony therein, in the charging of the jury, and in refusing requests to instruct the jury, as will more fully appear in and by the record and transcript of said proceedings therein and in the entry of judgment, and which errors it hereby assigns as grounds for the reversal of said judgment and which are as follows, to wit:

1. The court erred in sustainmg the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below), that portion of said answer contained in the fourth paragraph thereof, as follows, to wit:

Which patent the defendant alleges was not obtained nor issued in pursuance of the statutes of the United States which provide for the issuance of patents, and that such patent is and should be
163 wholly null and void. It further alleges that said Ocean Wave and Little Mary Lode mining claims were not, nor were either of them, located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered or uncovered in the discovery shaft of said Ocean Wave Lode mining claim or of said Little Mary Lode mining claim.

II. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below), that portion of said answer contained in the fifth paragraph thereof, as follows, to wit:

And denies that said patent relates back to or takes effect from the date of said alleged discovery and location for all purposes or for any purpose given or provided by the laws of the United States or of the State of Colorado concerning mining claims; but it alleges that there never was, at any time or by any person, any location whatever made of said pretended Ocean Wave Lode mining claim or of said Little Mary Lode mining claim.

III. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) that portion of said answer contained in the sixth paragraph thereof, as follows, to wit:

But the defendant alleges that the plaintiff and its officers, and particularly its directors and those in the possession, control, and management of the workings of said alleged lode mining claims, for

more than a year last prior to the beginning of this action have had full knowledge that the defendant was driving its said tunnel into, through, and across said pretended Ocean Wave and Little Mary Lode mining claims, and that the same was so driven into, through, and across said alleged lode mining claims with the knowledge and consent of the plaintiff and of the persons who were in possession of, and who were working and developing said alleged lode mining claims. The defendant further denies that it wrongfully or unlawfully retains possession of any part or portion of either of said alleged lode mining claims.

IV. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below), all of the tenth paragraph thereof as follows, to wit:

Tenth. It alleges that said Uinta tunnel and tunnel site location was made by William E. Hall, W. R. Mason, and Herman Tieje, on the thirteenth day of January, 1892; that said Hall, Mason, and Tieje were, at the time of the location thereof, citi-
164 zens of the United States, and over the age of twenty-one years; that they entered upon the unoccupied public mineral domain of the United States and located said Uinta tunnel and tunnel site, by placing at the face thereof a plain sign or notice, containing the name of the Uinta tunnel the course and distance thereof, the date of the location, the general course thereof, and the name of said locators above named; that, in addition thereto, they placed at the face of said tunnel a written notice describing said Uinta tunnel by metes and bounds, and giving the course thereof; and that they afterwards marked the same upon the surface, and the same was designated upon the ground by a line run through the trees and underbrush upon said mountain, and by stakes set at intervals along said lines duly marked with the name of said tunnel site, so that the same could be easily designated upon the ground by a line run through the trees and underbrush upon said mountain, and by stakes set at intervals along said line duly marked with the name of said tunnel site, so that the same could be easily designated upon the ground and along the surface thereof.

V. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the eleventh paragraph thereof, as follows, to wit:

Eleventh. It alleges that said Uinta tunnel and tunnel site location was made under and in compliance with the provisions of section 2323 of the Revised Statutes of the United States, and the rules and regulations adopted by the Department of the Interior of the United States thereunder, and was located on the thirteenth day of January, 1892, as will appear from the location certificate thereof, which fully appears in and by the records of the county of El Paso, where the same is duly and at length recorded in Book 79, at page 492, of the records of said county, and that the defendant, by divers mesne conveyances, acquired said Uinta tunnel and tunnel site

location and all the rights, properties and possession thereunto ap, pertaining and belonging, on or about the sixteenth day of May-1896, and has ever since said time been the owner thereof, together with all the rights belonging thereto.

VI. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the twelfth paragraph thereof, as follows, to wit:

Twelfth. It alleges that prior to the acquisition by it of the title of said tunnel, work had been diligently prosecuted thereon
165 from the time of its location up to the time of the aforesaid purchase thereof by this defendant, and that the same was prosecuted in full compliance with the provisions of section 2323 of the Revised Statutes of the United States; that at no time was work abandoned, neglected or discontinued for any successive period of six months, but that the same was prosecuted with due diligence at all times prior to the purchase thereof by this defendant; that from the time of its said purchase the defendant has prosecuted the work therein and thereon with great diligence for the purpose of boring said tunnel, and also for the discovery of veins therein, and in the manner and to the extent provided for under section 2323 of the Revised Statutes of the United States, and that at no time since the defendant has been the owner thereof has work been discontinued for a period of six consecutive months.

VII. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of paragraph thirteenth thereof, as follows, to wit:

Thirteenth. It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars ($125,000.00) and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars ($10,000.00).

VIII. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the fourteenth paragraph thereof as follows, to wit:

Fourteenth. It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location under and by virtue of the laws of the United States, and under the provisions of section 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of and in reliance upon said statute.

IX. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in

error (defendant below) all of the fifteenth paragraph thereof, as follows, to wit:

Fifteenth. It alleges that said Uinta tunnel entered the westerly side lines of the pretended Little Mary Lode mining claim at
166 a point distant from the mouth or portal of said tunnel about 550 feet more than one year prior to the commencement of the above entitled action; that said tunnel was driven through said pretended Little Mary Lode mining claim with great diligence, and was driven on its course (throu*th*) the side lines of said pretended Ocean Wave Lode mining claim, and when said tunnel had been driven through said pretended Ocean Wave and Little Mary Lode mining claims, it was distant from the mouth or portal thereof about 1175 feet; that in running said tunnel through said pretended Ocean Wave and Little Mary lode- and lode mining claims, the defendant drove the same a distance of about six hundred and twenty-five feet; that the same was driven through said pretended Ocean Wave and Little Mary Lode mining claims with the full knowledge and consent of the plaintiff at the great cost and expense, as above set forth; that said tunnel was so driven through said pretended lode mining claims more than a year prior to the commencement of the above entitled action, without any protest or objection made by the plaintiff or its officers, employees, or agents, but that the driving of said tunnel was acquiesced in by the plaintiff, its officers, servants, and employees; and that after driving said tunnel through and across said pretended Ocean Wave and Little Mary Lode mining claims, the defendant continued the prosecution of its said tunnel and drove the same to a distance of about twenty-two hundred feet and until it reached and penetrated the territory that is claimed by the Portland Gold Mining Company and it was after said tunnel had reached said distance that the plaintiff instituted the above entitled action, and the same was then instituted by the plaintiff because, for the reason and on account of the matters and things hereinafter recited and set forth.

X. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the sixteenth paragraph thereof, as follows, to wit:

Sixteenth. Further answering, it alleges that at a point distant from the mouth or portal of said tunnel, and in and upon the line thereof about nineteen hundred and thirty-one feet, and upon the ground embraced within the surface boundaries of the location of said tunnel, and within the location of the bore thereof, which location of said tunnel was made long prior to any location upon said territory by any other person or persons, the defendant, in driving its said tunnel, discovered, uncovered, and disclosed a vein and lode in rock in place, bearing gold, silver, and other precious metals, which said vein entered said tunnel and was parallel to the line of said tunnel for a distance of more than five hundred
167 feet, and is still within said tunnel and within the breast thereof; that the same is now on the line and bore thereof

near the south line of said tunnel that said tunnel is at present driven into the mountain for a distance slightly exceeding twenty-two hundred feet, and is through and beyond the easterly side line of said pretended Ocean Wave Lode mining claim about eleven hundred feet; that said vein is intersected, uncovered, and discovered in said tunnel as above set forth, and is described as the Uinta Tunnel No. 23 lode, and is a cross lode to any lode ever uncovered and discovered in said territory by any person or persons; and that the same was never uncovered or discovered by any person or persons until the same was discovered and cut as aforesaid by said Uinta tunnel.

XI. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the seventeenth paragraph thereof as follows, to wit:

Seventeenth. It alleges that, in driving said tunnel, it has followed said cross lode by it discovered as aforesaid upon territory which was segregated and marked, and upon ground appropriated by said tunnel location parallel in location thereto, as it had full right and authority to do in virtue and by right of section 2336 Revised Statutes of the United States; that it located said cross lode by calling it Uinta Tunnel No. 23 lode and mining claim, and by placing at the mouth of said tunnel in a conspicuous place a location certificate showing the general course of said lode and the number of feet claimed on each side of the discovery thereof, together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator thereof, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused a location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — records of said clerk and recorder, and claimed by the location thereof from point of discovery thereof running twelve hundred feet southerly and three hundred feet northerly; that said cross lode is at the present time disclosed and uncovered and appears in the breast of said tunnel running almost parallel with the course of said tunnel; that under and by virtue of the Revised Statutes of the United States hereinabove referred to, and in, under, and by virtue of the terms of section 2336 thereof this defendant has the right to own, possess, and enjoy said cross lode so by it uncovered and discovered as aforesaid, and to mine, extract, remove, and sell the ores there-
168 from, and that said vein so uncovered and disclosed as aforesaid and now appearing at the breast of said tunnel is a well-defined gold and silver bearing lode or vein in rock in place, between the walls of rock and is valuable for mining and for the minerals therein contained; that said cross lode by it discovered as aforesaid was never uncovered, disclosed, or discovered by the plaintiff in any workings upon said pretended Ocean Wave and Little Mary Lode mining claims, whether done by said plaintiff or any other person or persons whomsoever; that the defendant has

claimed and still claims the right to own, possess, and operate said lode as of the date, or by virtue of said location of said Uinta tunnel, to wit, of the thirteenth day of January, A. D. 1892, as was set forth and claimed in and by virtue of said location certificate thereof hereinbefore described, and by virtue of said notice posted at the mouth of said Uinta tunnel, as hereinbefore alleged; that said vein so uncovered and disclosed as aforesaid, does not outcrop or appear at the surface, nor was the same known to exist at the time of the location of said Uinta tunnel, or until the same was discovered by this defendant, as it was discovered by it on or about the eighteenth day of December, A. D. 1897, that the defendant under and by virtue of said discovery has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine, extract, and sell ores and minerals from said vein over, through, and along said tunnel as said tunnel entered along and across said pretended Ocean Wave and Little Mary Lode mining claims; that the defendant claims the right to use the bore of said tunnel by reason of the facts aforesaid as it penetrates said Little Mary lode and lode mining claim, and across the same as hereinabove stated, and as said tunnel likewise penetrates through and across said pretended Ocean Wave lode and lode mining claim, as hereinabove stated; that the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000.00) as aforesaid in reaching uncovering, and discovering said ore body, has no right to interfere with this defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims; but, on the contrary, the plaintiff by its conduct and actions in the premises, as hereinbefore recited and set forth, has permitted and allowed this defendant to expend said large sums of money and has permitted and allowed it so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lode- and lode mining claims, until the same has ripened into such a license and permission to so cross said pretended Ocean Wave and Little Mary lode and lode mining claims that the defendant can not now be disturbed in its use of said tunnel.

169 XII. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the eighteenth paragraph thereof, as follows, to wit:

Eighteenth. It alleges that, at a point distant from the mouth or portal of said tunnel, and in and upon the line thereof two thousand one hundred and two feet, upon the ground embraced within the surface boundaries of the location of said Uinta Tunnel location and within the bore thereof, which location of said tunnel was made long prior to any location upon said territory by any other person or persons whatever, that in driving said tunnel this defendant discovered, uncovered and disclosed a vein and lode, in rock in place, which carried gold, silver, and other precious metals on the twenty-third day of December A. D. 1897, which said vein was cut, crossed,

intersected, and penetrated by said tunnel, and said vein so discovered as aforesaid had been segregated from the public domain of the United States, and located and appropriated by said Uinta tunnel and tunnel site, and is upon ground that was appropriated by said Uinta Tunnel location long prior to any other location or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 24 lode, and placed and erected at the mouth of said tunnel in a conspicuous place a location certificate or notice thereof, setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator thereof, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — among the records in the office of said clerk and recorder, and claimed by the location thereof from the point of discovery thereof running northerly seven hundred and fifty feet and southerly seven hundred and fifty feet; that said discovery of said Uinta Tunnel No. 24 lode was made on the twenty-third day of December, A. D. 1897, in full conformity with the laws of the United States and of the State of Colorado, in reference to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place near the mouth of said tunnel, and the other recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 24
170 lode and the vein therein discovered as aforesaid does not outcrop, apex, or appear on the surface of the ground at any point whatever; and that this defendant has claimed and has the right to own possess, operate, and enjoy said lode, as of the date and by virtue of the location of said Uinta Tunnel No. 24 lode, to wit, on the thirteenth day of January, A. D. 1892, and so sets forth and claims in and by virtue of said location certificate thereof hereinbefore described, and by virtue of said notice posted at the mouth of said Uinta Tunnel No. 24 lode, as hereinbefore alleged; that under and by virtue of said discovery it has the right to mine, extract, and sell the ores and minerals therefrom, and has the right to mine, extract, and sell the ores and mineral from said vein, and has the right to remove said ores and minerals by it mined and extracted through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim, and across said pretended Little Mary lode and lode mining claim, as well as across and along said pretended Ocean Wave lode and lode mining claim; that the defendant claims the right to use the bore of said tunnel through and across said pretended Ocean Wave and Little Mary Lode mining claims by reason of the facts aforesaid, and that the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000.00) as

aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims; but that, on the contrary, the plaintiff by its conduct and actions in the premises as hereinabove recited and set forth, has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars ($135,000.00), and has permitted and allowed the defendant to so proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lode- and lode mining claims until the same has ripened into such a license and permission as entitles the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lode- and lode mining claim-, and that said license and permission is such that the defendant can not be disturbed therein.

XIII. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the nineteenth paragraph thereof, as follows, to wit:

Nineteenth. It alleges that at a point in said tunnel from the mouth or portal thereof about two thousand one hundred and eighteen feet upon ground embraced within the surface boundaries of said Uinta tunnel and within the bore thereof, which
171 location of said tunnel was prior to any other location made on said territory aforesaid, the defendant, in driving and prosecuting said tunnel, uncovered and discovered on the sixth day of January, A. D. 1899, a well defined lode or vein in rock in place, which carried gold, silver, and other precious metals, which said vein was cut, crossed, intersected, and penetrated by said tunnel; that said vein so discovered as aforesaid has been segregated from the public domain of the United States, and located and appropriated by the Uinta Tunnel location long prior to any location or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 25 lode, and placed and erected at the mouth of said tunnel in a conspicuous place, a location certificate or notice thereof setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof, showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator, to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused a location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — among the records in the office of said clerk and recorder, and claimed by the location thereof from the point of discovery thereof, running seven hundred and fifty feet in a northerly direction and seven hundred and fifty feet in a southerly direction; that said discovery of said Uinta Tunnel No. 25 lode was had and made on the sixth day of January, A. D. 1897, in full conformity with the laws of the United States, and of the State of Colorado, in reference

to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place at the mouth of said tunnel as aforesaid, and the other thereof recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 25 lode and vein thereof as aforesaid, does not outcrop, apex, or appear at the surface, or at any other point whatever; that under and by virtue of said discovery, this defendant has the right to mine, extract, remove, and sell the ores and minerals therefrom; that said vein was uncovered and discovered as aforesaid and known as and called Uinta Tunnel No. 25 lode, is a well defined vein between two walls, in rock in place, and carries gold, silver, and other precious metals; that said lode was never uncovered or discovered by the plaintiff or any other person or persons whomsoever; and that this defendant has claimed and has the right to own, possess, operate, and enjoy said lode as of the date by virtue of the location of said Uinta tunnel, to wit, the thirteenth day
172 of January, A. D. 1892, and so sets forth and claims in and by virtue of said location certificate thereof, hereinbefore described, and by virtue of said notice posted at the mouth of said Uinta tunnel as hereinbefore alleged; that it has the right to remove said ores and minerals, by it mined and extracted from said Uinta Tunnel No. 25 lode, through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim, and across said pretended Little Mary lode and lode mining claim, as well as along and across said pretended Ocean Wave lode and lode mining claim; that it claims the right to use the bore of said tunnel, through and across said pretended Ocean Wave and Little Mary lode and lode mining claims, by reason of the facts aforesaid; that the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with this defendant in operating its tunnel, over, through, and along said pretended Ocean Wave and Little Mary lode and lode mining claims, but on the contrary the plaintiff by its conduct and actions in the premises hereinabove recited and set forth, has permitted and allowed the defendant to expend the sum of more than one hundred and thirty-five thousand dollars ($135,000) and has permitted and allowed the defendant to so proceed with said tunnel, through, and across said pretended Ocean Wave and Little Mary Lode mining claims, until the same has ripened into such a license and permission as entitles the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lode and lode mining claims; and that said license and permission is such that the defendant can not be disturbed therein.

XIV. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the twentieth paragraph thereof, as follows, to wit:

Twentieth. It alleges that, at a point in said tunnel distant from the mouth or portal about two thousand one hundred and eighty feet, upon ground embraced within the surface boundaries of said tunnel, and within the bore thereof, which location of said tunnel was prior to any other location made on said territory, this defendant in driving and prosecuting its said tunnel, uncovered, and discovered, on the fifteenth day of December, A. D. 1897, a well defined lode or vein in rock in place, which carries gold, silver, and other precious metals which said vein was cut, crossed, intersected, and penetrated by said tunnel; that said vein so discovered as aforesaid had been segregated from the public domain of the United States,
173 and located and appropriated by said location of said Uinta tunnel and tunnel site, and is upon ground that was appropriated by said Uinta Tunnel location long prior to any other location or attempted or pretended location thereof; that this defendant located said vein by calling the same Uinta Tunnel No. 26 Lode, and placed and erected at the mouth of said tunnel, in a conspicuous place, a location certificate or notice thereof setting forth and showing the general course of said lode, the number of feet claimed on each side of said discovery thereof, together with a description thereof showing the date of discovery, the date of location, the number of feet claimed as aforesaid, and the name of the locator to wit, the Uinta Tunnel Mining and Transportation Company; that it afterwards caused the location certificate thereof to be filed in the office of the clerk and recorder of El Paso county, Colorado, in Book 278, at page — among the records in the office of said clerk and recorder; that it claimed by the location thereof and upon the discovery thereof one thousand feet running in a northerly direction and five hundred feet in a southerly direction from the point of discovery thereof; that said discovery of said Uinta Tunnel No. 26 lode was had and made on the fifteenth day of December, A. D. 1897, in full conformity with the laws of the United States and of the State of Colorado, in reference to such locations; that a location certificate thereof was made in duplicate, one of which certificates was posted in a conspicuous place at the mouth of said tunnel as aforesaid, and the other thereof recorded in the office of the clerk and recorder of El Paso county, Colorado, as aforesaid, on the second day of March, A. D. 1898; that said Uinta Tunnel No. 26 lode does not outcrop, apex, or appear at the surface of the ground at any point whatever; that said vein uncovered and discovered as aforesaid, and known as and called Uinta Tunnel No. 26 lode, is a well defined vein between two walls of rock in place and carries gold, silver, and other precious metals; that said lode was never uncovered or discovered by the plaintiff or any other person or persons whomsoever; that this defendant further claims that it has the right to own, possess, operate, and enjoy said lode as of the date and by virtue of the location of said tunnel, to wit, on the thirteenth day of January, A. D. 1892; that by virtue of said location certificate thereof hereinbefore described and by virtue of said notice posted at the mouth of said tunnel as hereinbefore alleged, it has the right to remove said ores and miner-

als, by it mined and extracted from said Uinta Tunnel No. 26 lode, through and along said tunnel where said tunnel enters said pretended Little Mary lode and lode mining claim and across said Little Mary lode and lode mining claim, as well as along and
174 across said pretended Ocean Wave lode and lode mining claim; that this defendant claims the right to use the bore of said tunnel, through and across said pretended Little Mary and Ocean Wave lode- and lode mining claim- by reason of the facts aforesaid; that the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000.00) as aforesaid, in reaching, uncovering, and discovering said ore body, has no right to interfere with this defendant in crossing over, through, and along said pretended Ocean Wave and Little Mary lode- and lode mining claims; but on the contrary the plaintiff by its conduct and actions in the premises as hereinbefore set forth, has permitted and allowed the defendant to expend said large sum of money and has permitted and allowed the defendant to so proceed with its said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims, until the same has ripened into a license and permission such as entitled the defendant to use its said tunnel as it penetrated said pretended Ocean Wave and Little Mary lodes and lode mining claims; and that said license and permission is such that the defendant cannot be disturbed therein.

XV. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the twenty-first paragraph thereof, as follows, to wit:

"Twenty-first. It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the act of Congress in reference to tunnel rights and subject to the laws of the State of Colorado in reference to the right to run tunnels through grounds that may be patented, for the purpose of reaching territory that belonged to tunnel owners beyond such patented claims, and subject to the rights which the defendant The Uinta Tunnel Mining and Transportation Company and its grantors, had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims that it might cut or discover in driving said tunnel as is guaranteed to the locator of said tunnel under and by virtue of section 2323 of the Revised Statutes of the United States; that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiffs claim the right to patent the same under the laws of the United States, was not made until long after the location of the said Uinta tunnel, and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been
175 and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of

the United States, and of the State of Colorado, which authorize and provide for the location and prosecution of such tunnels and which defines and determines the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary Lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and are held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with section 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims, and to drive drifts therein, and to follow said lode claims as located by this defendant and to reach lode claims so owned by this defendant as hereinbefore and hereinafter stated.

XVI. The court erred in sustaining the motion of the defendant in error (plaintiff below) to strike from the answer of the plaintiff in error (defendant below) all of the twenty-second paragraph thereof, as follows, to wit:

Twenty-second. It avers that, from about twenty-two hundred and fifty feet from the mouth or portal of said Uinta tunnel, said tunnel run along, through, and across the Black Jasper lode; that on the thirteenth day of January, A. D. 1897, Vance Carothers, who was then and there a citizen of the United States over the age of twenty-one years, entered upon the unoccupied public mineral domain of the United States, and located what is known as said Black Jasper Lode mining claim; that the same was marked by six substantial posts, one at each corner and one at the center of each side line thereof, which posts were hewed and marked on the sides in towards the claim; that a discovery shaft was sunk thereon to a depth of more than ten feet from the lowest point of the rim thereof at the surface, which disclosed a well defined vein which carried gold and other precious metals therein; that at the point of said discovery the locator placed a plain sign or notice containing the name of the lode, the date of the discovery, the name of the locator, and the general course thereof; that afterwards on the second day of February, A. D. 1897, said Vance Carothers caused a location certificate to be made of said Black Jasper lode, which contained the name of the lode, the name of the locator, the date of the location, and described the same by metes and bounds; that said location certificate was afterwards on the second day of February, A. D. 1897, duly recorded in the office of the clerk and recorder of El Paso county, Colorado; that this defendant, by mesne conveyances from the locator and owner of said Black Jasper Lode mining claim, became the
176 owner thereof and is now such owner; that said tunnel enters said Black Jasper lode as aforesaid at about twenty-two hundred and fifty feet from the mouth or portal thereof, and continues along and through said Black Jasper lode as located to the breast thereof; that this defendant has the right, under the laws of the State of Colorado and the acts of Congress, to enter through and along said Ocean Wave and Little Mary lodes and lode mining claims for the purpose of reaching the lode claims owned by this defendant beyond the mouth or portal of said tunnel, and beyond said

Ocean Wave and Little Mary lodes and lode mining claims; that said Ocean Wave and Little Mary lodes and lode mining claims lie between the mouth or portal of said tunnel and said Black Jasper Lode mining claim, and between said Uinta Tunnel No. 23 lode, and mining claim, and said Uinta Tunnel No. 24 lode and mining claim, and said Uinta Tunnel No. 25 lode and mining claim and said Uinta Tunnel No. 26 lode and mining claim, from which said last lode and mining claim this defendant has been shipping rich and valuable ore; that by reason of the ownership of said lode and mining claims last above described and by virtue of the laws of the State of Colorado, and the acts of Congress, this defendant has the right to cross through and beyond said Ocean Wave and Little Mary lodes and lode mining claims for the purpose of reaching said lode mining claims which are owned by and which belong to this defendant, of said answer.

XVII. The court erred in charging the jury over and against the objection and exception of the plaintiff in error, as follows:

GENTLEMEN OF THE JURY: Under the issues in this case, the plaintiff is entitled, as a matter of law, to recover possession of the property claimed in the complaint. Under the issues as they come before the court, upon the trial, the court is obliged to exclude the testimony on the part of the defendant, and you are therefore instructed to return a verdict in favor of the plaintiff for possession of the premises described in the complaint.

XVIII. The court erred in refusing to instruct the jury, on the request of the plaintiff in error (defendant below) as follows:

If the jury believe from the evidence that defendant, for more than a year prior to the time of instituting this action, was extending its tunnel through and beyond the property claimed by plaintiff, and that in so doing the defendant expended large sums of money for machinery and labor, and that all thereof was done with the full knowledge of plaintiff, and without any objection
177 from or protest on the part of plaintiff, until long after defendant had driven the bore of its tunnel a distance of about twenty-two hundred feet, when defendant discovered and uncovered a vein of ore in mineral on the line of its tunnel not previously known to exist, and had commenced to mine, extract, ship and sell rich and valuable ore and mineral therefrom, making no other or further claim to the Little Mary or Ocean Wave Lode and mining claim, except the right of entry and exit through and along the bore of said tunnel, to said discovery so made as aforesaid, then you will find for the defendant.

XIX. The court erred in refusing to instruct the jury, on the request of the plaintiff in error (defendant below) as follows:

The court instructs the jury, as a matter of law, that there can be no location of a mining claim upon the public domain, until there has been a discovery of minerals thereon. The simple driving of a location stake, the marking of the claim upon the ground, the survey, making a location certificate and recording the same, is not sufficient. Until a vein in rock in place has been discovered

there is no valid discovery and no valid location can be made until such discovery. If the jury believe from the evidence in this case that the plaintiff or its grantors, had not made a discovery of mineral in its Little Mary and Ocean Wave lodes, prior to the location of the tunnel claimed by defendant, and you further believe from the evidence that the said tunnel from the time of its location, was being prosecuted with reasonable diligence and that there was no failure to prosecute work on the tunnel for a period of six months, until after defendant was enjoined from working its said tunnel, that the work on said tunnel was continuous, then and in such case you will find for the defendant.

XX. The court erred in refusing to instruct the jury, on the request of the plaintiff in error (defendant below) as follows:

If the jury believe from the evidence that there was no discovery of a vein of mineral in rock in place, made in the Little Mary and Ocean Wave lodes, or either of them, until after the location of the tunnel claimed by defendant, then and in such case it was not necessary, when application for patent for said Little Mary and Ocean Wave lodes or either of them was made, for the owners of the tunnel, if such owners had not at that time reached the westerly side line of the Little Mary lode with the bore of its tunnel
178 to file an adverse claim in the United States Land Office and to commence a suit in support thereof to preserve the rights of such owners to the said tunnel.

XXI. The court erred in refusing to instruct the jury on the request of the plaintiff in error (defendant below) as follows:

If the jury believe from the evidence that defendant makes no claim to any vein, nor claims the right to follow or drive upon any vein, within the surface boundaries of the Little Mary and Ocean Wave lode and mining claims or either of them, and that the defendant is the owner of the Uinta tunnel mentioned and described in the pleadings, and that the mouth of said tunnel was and is located upon ground owned and in the lawful possession of defendant, then and in such case, under and by virtue of section one of chapter sixty-two of the Session Laws of the State of Colorado for the year, 1897, defendant has the right to drive and continue its tunnel through and across said Little Mary and Ocean Wave lode and mining claims, and each thereof, and to use the bore of said tunnel only for entry and exit to remove ore and mineral from properties beyond said Little Mary and Ocean Wave lode and mining claims that defendant might own.

XXII. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 1, being a certified copy of the location certificate of the Ocean Wave lode mining claim.

XXIII. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit 2, being a certified copy of the location certificate of the Little Mary lode mining claim.

XXIV. The court erred in admitting in evidence, over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 3, being a certified copy of a mining deed dated March 4, A. D. 1892, from J. B. Winchell and E. W. McNeal to John N. Bartels.

XXV. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 4, being a certified copy of a mining deed dated March 10, A. D. 1892, from J. B. Winchell and E. W. McNeal to Geo. M. Carter.

XXVI. The court erred in admitting in evidence, over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 5, being a certified copy of a mining deed dated February 13, A. D. 1892, from J. B. Winchell and E. W. McNeal to J. T. Estill.

179 XXVII. The court erred in admitting in evidence, over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 6, being a certified copy of a mining deed dated February 10, A. D. 1892, from J. B. Winchell and E. W. McNeal to H. C. Shimp and H. E. Bassett.

XXVIII. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 7, being a certified copy of a mining deed dated February 1, A. D. 1892, from J. B. Winchell and E. W. McNeal to H. M. Fitzhugh.

XXIX. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error defendant in error's Exhibit No. 8 being a certified copy of a mining deed dated February 8, A. D. 1892, from J. B. Winchell and E. W. McNeal to C. E. Hudson.

XXX. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 9, being a certified copy of a mining deed dated February 8, A. D. 1892, from J. B. Winchell and E. W. McNeal to C. E. Hudson.

XXXI. The court erred in admitting in evidence, over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 10, being a mining deed dated March 23, A. D. 1892, from H. E. Bassett, D. P. Sill, J. B. Winchell, E. W. McNeal, C. V. Potts, H. T. Cooper, J. T. Estill, G. M. Carter, H. M. Fitzhugh, and H. C. Shimp to the Creede and Cripple Creek Mining and Milling Company.

XXXII. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error defendant in error's Exhibit No. 11, being a mining deed dated May 25, A. D. 1892, from J. N. Bartels to the Creede and Cripple Creek Mining and Milling Company.

XXXIII. The court erred in admitting in evidence, over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 12, being a mining deed dated April

8, A. D. 1892, from C. E. Hudson to the Creede and Cripple Creek Mining and Milling Company.

XXXIV. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 13, being a certified copy of an amended location certificate of the Ocean Wave Lode mining claim.

180 XXXV. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 14, being a certified copy of an amended location certificate of the Little Mary Lode mining claim.

XXXVI. The court erred in admitting in evidence over and against the objection and exception of the plaintiff in error, defendant in error's Exhibit No. 15, being the patent of the United States of America to the Creede and Cripple Creek Mining and Milling Company for the Ocean Wave and Little Mary Lode mining claims, survey No. 8192.

XXXVII. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness, the location of the discovery on the Uinta Tunnel No. 23 lode.

XXXVIII. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness how the discovery of the Uinta Tunnel No. 23 lode was made.

XXXIX. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness that there was uncovered and discovered in the bore of the tunnel at a point about 750 feet east of the easterly side line of the Ocean Wave lode, a vein of mineral in rock in place carrying rich and valuable ores; that that vein was continuous with the bore of the tunnel for a distance of 600 feet; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein and of great value carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel; that after the discovery thereof there was a proper location made of said lode by the defendant by staking the same and posting at the portal of the tunnel a proper notice and thereafter making and recording a location certificate thereof.

XL. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness, the location of the discovery in the Uinta Tunnel No. 24 lode.

XLI. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness, that there was uncovered and discovered in the bore of the tunnel

181 at a point about 955 feet east of the easterly side line of the Ocean Wave lode a vein of mineral in rock in place carrying

rich and valuable ores; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein and of great value, carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel; that after the discovery thereof there was a proper location made of said lode by the defendant by staking the same and posting at the portal of the tunnel a proper notice and thereafter making and recording a location certificate thereof.

XLII. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness, the location of the discovery in the Uinta Tunnel No. 25 lode.

XLIII. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness that there was uncovered and discovered in the bore of the tunnel at a point about 971 feet east of the easterly side line of the Ocean Wave lode a vein of mineral in rock in place carrying rich and valuable ores; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein and of great value, carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel; that after the discovery thereof there was a proper location made of said lode by the defendant, by staking the same, posting at the portal of the tunnel a proper notice, and thereafter making and recording a location certificate thereof.

XLIV. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by L. W. Davis as a witness, the location of the discovery in the Uinta Tunnel No. 26 lode.

XLV. The court erred in refusing to permit the plaintiff in error (defendant below) to prove, by L. W. Davis as a witness, that there was uncovered and discovered in the bore of the tunnel, at a point about 1034 feet east of the easterly side line of the Ocean Wave lode, a vein of mineral or rock in place carrying rich and valuable
182 ores; that the discovery of the vein was between two well defined walls and in place; that the ore and mineral therein uncovered and discovered was a blind lode and vein of great value, carrying gold; that the same had not before that time been discovered by any other person or parties at the surface; that it was upon ground belonging to and within the surface boundaries of the Uinta tunnel and had not been appropriated by any other person or parties prior to the location of the tunnel. That after the discovery thereof there was a proper location made of said lode by the defendant by staking the same and posting at the portal of the tunnel a

proper notice and thereafter making and recording a location certificate thereof.

XLVI. The court erred in refusing to permit the plaintiff in error (defendant below) to introduce in evidence its Exhibit "B" being a certified copy of the location certificate of the Uinta Tunnel No. 23 lode.

XLVII. The court erred in refusing to permit the plaintiff in error (defendant below) to introduce in evidence its Exhibit "C" being a certified copy of the location certificate of the Uinta Tunnel No. 24 Lode mining claim.

XLVIII. The court erred in refusing to permit the plaintiff in error (defendant below) to introduce in evidence its Exhibit "D" being a certified copy of the location certificate of the Uinta Tunnel No. 25 Lode mining claim.

XLIX. The court erred in refusing to permit the plaintiff in error (defendant below) to introduce in evidence its Exhibit "E" being a certified copy of the location certificate of the Uinta Tunnel No. 26 Lode mining claim.

L. The court erred in refusing to permit the plaintiff in error (defendant below) to prove, by W. R. Mason as a witness, what work was done upon the Uinta tunnel on and after November, A. D. 1891.

LI. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by W. R. Mason as a witness, that in the month of November, 1891, he went to what now appears to be the portal of the Uinta tunnel, and upon the unoccupied and unappropriated public domain, and started to work thereon; that afterwards and on the 18th day of February, 1892, the witness W. R. Mason, who was then a citizen of the United States over the age of twenty-one years, together with William E. Hall, who was likewise a citizen of the United States and over the age of twenty-one years, and one Herman Teitija, who was also a citizen of the United States and over the age of twenty-one years, located the Uinta Tunnel claim
183 and tunnel site and placed a notice at the portal of the tunnel containing the name of tunnel, giving its distances and courses and the names of locators or claimants; that from the time of the location thereof up to the month of September 1895, the tunnel was worked continuously and diligently and there was no time when it remained idle for a period to exceed three months, and that the location was made in good faith and prosecuted with all the diligence that he and the locators thereof could prosecute the same until September, 1894, when it passed out of the hands of Mason, Hall, and Teitija to Thomas J. Maloney. That at the time of the location and the making out of the location certificate of the Uinta tunnel on the 18th day of February 1892, the same was surveyed; that the surface boundaries thereof were marked by substantial posts hewed in towards the bore of the tunnel, and that the tunnel was marked by posts running along the bore of the tunnel for a distance of three thousand feet and for a distance of fifteen hundred feet on each side thereof.

LII. The court erred in refusing to permit the plaintiff in error

(defendant below) to prove, by W. R. Mason, as a witness, that at the time of the location of the Uinta tunnel in February, 1892, and for more than a year thereafter there had been no discovery whatsoever of any kind nature or description of ore in the discovery shafts of either the Little Mary or Ocean Wave lodes and mining claims or upon any other part or portion of the territory embraced within the surface boundaries of either of said lodes and mining claims.

LIII. The court erred in refusing to permit the plaintiff in error (defendant below) to introduce in evidence its Exhibit "F" being a certified copy of the location certificate of the Uinta tunnel.

LIV. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by T. J. Maloney as a witness, a continuous working of the Uinta tunnel.

LV. The court erred in refusing to permit the plaintiff in error (defendant below) to prove, by T. J. Maloney as a witness, that from the time he sold the half interest to the time he parted with the entire interest to Mr. Doyle it was worked with great dispatch and great diligence and a plant of machinery was placed at the portal of the tunnel at an expense of $10,000 or $15,000.

LVI. The court erred in refusing to permit the plaintiff in error (defendant below) to prove by James Doyle as a witness, that immediately after he became interested in and became the owner of the tunnel he placed a plant of machinery therein at an
184 expense of $15,000; that from that time on the tunnel was driven with great dispatch; that he expended in and about the driving of the bore of the tunnel the further sum of $50,000; that no objection was made by the Creede and Cripple Creek Mining and Milling Company, its officers servants, or employees against the working of the tunnel; that no objection had been made by them until the tunnel was driven to its present face, a distance of 1,100 feet beyond the easterly side line of the Ocean Wave lode, and then objection was only made when the then owner of the tunnel had uncovered and discovered a vein of ore from which he was mining, extracting, and selling rich and valuable bodies of ore.

LVII. The court erred in refusing to permit the plaintiff in error (defendant below) to prove, by James Doyle as a witness, that at the time of driving the tunnel through the territory embraced in the surface boundaries of the Little Mary and Ocean Wave Lode mining claims the control of the stock of the plaintiff was held by parties other than those that now have control of it, and that the parties now having control and who instituted this suit purchased the control of the stock for the purpose of annoying and harrassing this witness in the driving and prosecuting of his tunnel and to prevent him from extracting the ore and mineral which he had uncovered and discovered in driving the tunnel.

LVIII. The court erred in refusing to permit the plaintiff in error (defendant below) to prove, by James Doyle, as a witness, that at the time the bore of the tunnel was being driven through the Ocean Wave and Little Mary lodes the then officers and agents of the Creede and Cripple Creek Mining and Milling Company the

owners of the Little Mary and Ocean Wave Lode claims, acquiesced in the driving of said tunnel through said property.

LIX. The court erred in refusing to permit the plaintiff in error (defendant below) to introduce in evidence its Exhibit "F," being a certified copy of the location certificate of the Black Jasper Lode mining claim.

LX. The court erred in refusing to permit the plaintiff in error (defendant below) to introduce in evidence its Exhibit "H" being a certified copy of the location certificate of the Uinta Tunnel No. 1 Lode mining claim.

LXI. The court erred in receiving in evidence, over and against the objection and exception of the plaintiff in error (defendant below) the verdict of the jury herein.

LXII. The court erred in refusing to grant the motion of the defendant for a new trial.

185 LXIII. The court erred in the rendition and entry of judgment against the plaintiff in error (defendant below).

CHARLES J. HUGHES, JR., AND
SCOTT ASHTON,
Attorneys for Plaintiff in Error.

Indorsed: No. 3658, div. (—) In the United States court of appeals. The Uinta Tunnel Mining and Transportation Company *vs.* The Creede and Cripple Creek Mining and Milling Co. Assignment of errors. Filed Mar. 29, 1902. Robert Bailey, clerk as March 4, 1902.

UNITED STATES OF AMERICA, } ss:
Eighth Judicial District, }

In the United States Circuit Court of Appeals for the Eighth Judicial District.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Defendant in Error.

To the honorable judges of the United States court of appeals for the eighth judicial district:

Now comes The Uinta Tunnel Mining and Transportation Company, plaintiff in error, and petitions this honorable court to allow a writ of error to be directed to the circuit court of the United States for the district of Colorado, to remove to this the United States circuit — of appeals for the eighth circuit, for review thereof, the record in the case lately pending in said court below, wherein the above named plaintiff in error was defendant and the above named

defendant in error was plaintiff, and particularly the judgment rendered by the circuit court in the said cause.

Your petitioner respectively states that he has this day filed herewith his assignment of errors committed by the court below in said cause, and intended to be urged by your petitioner and plaintiff in error in the prosecution of this his suit in error.

Dated March 29th, A. D. 1902.

CHARLES J. HUGHES, JR., AND
SCOTT ASHTON,
Attorneys for Plaintiff in Error.

Indorsed: No. 3658. In the U. S. circuit court of appeals The Uinta Tunnel M. & M. Company *vs.* The Creede and Cripple Creek M. & M. Co. Petition for writ of error. Filed Mar. 31, 1902. Robert Bailey, clerk.

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THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents, that we, The Uinta Tunnell Mining and Transportation Co. F. M. Woods and H. E. Woods are held and firmly bound unto The Creede and Cripple Creek Mining and Milling Company in the full and just sum of three hundred dollars to be paid to the said The Creede and Cripple Creek Mining Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of March in the year of our Lord one thousand nine hundred and two.

Whereas, lately, at the November term, A. D. 1902, of the circuit court of the United States, for the district of Colorado, sitting at Denver, in a suit pending in said court between The Creede and Cripple Creek Mining Company plaintiff and The Uinta Tunnel Mining and Transportation Company, defendant, judgment was rendered against the said The Uinta Tunnell Mining and Transportation — for possession of the premises described in the complaint and for costs and the said Uinta Tunnel Mining and Transportation Company having obtained a writ of error to the United States circuit court of appeals for the eighth circuit to reverse the judgment of the said circuit court; and a citation directed to the said The Creede and Cripple Creek Mining and Milling Company citing and admonishing it to be and appear, in the United States circuit court of appeals, for the eighth circuit at the city of St. Louis, Missouri sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said The Uinta Tunnel Mining and Transportation Company shall prosecute said writ of error to effect, and answer all damages

and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[Seal Uinta T. M. & T. Co.]

THE UINTA TUNNEL, MINING & TRANSPORTATION CO., [SEAL.]
By F. M. WOODS, *Sec'y.* [SEAL.]
F. M. WOODS. [SEAL.]
H. E. WOODS. [SEAL.]

Sealed and delivered in presence of
—— ——.

Approved
JOHN A. RINER, *Judge.*

187 *Justification.*

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

F. M. Woods and H. E. Woods, sureties on the within bond, being each first duly sworn, deposes and sa*ith* that he is worth in property not exempt from execution the sum below set opposite his name that is to say:

As to F. M. Woods, three hundred dollars. As to H. E. Woods, three hundred dollars. As to —— ——, — dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

F. M. WOODS.
H. E. WOODS.

Subscribed and sworn to before me, at Denver, this sixth day of March, A. D. 1902.

[NOTARIAL SEAL.] FREDERICK E. BROWNE,
Clerk, Notary Public.

My commission expires January 2, 1906.

Indorsed: No. 3658. Circuit court of the United States, district of Colorado. The Creede and Cripple Creek M. & M. Co. *vs.* The Uinta Tunnel Mining and Transportation Company. Bond on writ of error. $300.00. Filed Mar. 31, 1902. Robert Bailey, clerk.

Writ of Error to United States Circuit Court of Appeals, Eighth Circuit

THE UNITED STATES OF AMERICA:

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

The President of the United States of America to the honorable

the judges of the United States circuit court for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the November term, 1902, thereof, between The Creede and Cripple Creek Mining and Milling Company *vs.* The Uinta Tunnel Mining and Transportation Company, a manifest error hath happened, to the great damage of the said The Uinta Tunnel Mining and Transportation Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 28th day of May, A. D. 1902, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

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Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of March in the year of our Lord, one thousand nine hundred and two and of the Independence of the United States the 126th year. Issued, at office in Denver, in said district, with the seal of the United States circuit court, for the district of Colorado, and dated as aforesaid.

Seal United States Circuit Court, District of Colorado.

ROBERT BAILEY,
Clerk United States Circuit Court, District of Colorado,
By CHARLES W. BISHOP,
Deputy Clerk.

Allowed by
JOHN A. RINER, *Judge.*

Return.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

Seal United States Circuit Court, District of Colorado.

In witness whereof, I hereunto subscribe my name, and affix the seal of said United States circuit court, for the district of Colorado, at Denver, in said district, this 9th day of May 1902.

ROBERT BAILEY, *Clerk.*

No. 3658. United States circuit court of appeals eighth circuit. The Uinta Tunnel, Mining and Transportation Company, 189 plaintiff in error, *vs.* The Creede and Cripple Creek Mining and Milling Company, defendant in error. Writ of error. To U. S. circuit court, district of Colorado. Filed Mar. 31, 1902. Robert Bailey, clerk.

UNITED STATES OF AMERICA, *Eighth Judicial Circuit,* } *ss:*

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America to the Creede and Cripple Creek Mining and Milling Company, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the United States circuit court for the district of Colorado, sitting at Denver, wherein The Uinta Tunnel Mining and Transportation Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Seal United States Circuit Court, District of Colorado.

Witness, the Honorable John A. Riner, judge of the United States district court for the district of Wyoming assigned to hold the circuit and district courts for the district of Colorado, this 31st day of March, A. D. 1902.

JOHN A. RINER, *Judge.*

Attest:

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP, *Deputy Clerk.*

Proof of Service.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

Received a copy of the within citation this 31st day of March, A. D. 1902.

THOMAS, BRYANT & LEE,
Attorneys for Defendant in Error.

Original. No. 3658. United States circuit court of appeals, eighth circuit. Uinta Tunnel Mining and Transportation Company *vs.* The Creede and Cripple Creek Mining and Milling Com-
190 pany. Citation. Filed Mar. 31, 1902. Robert Bailey, clerk. Charles J. Hughes, Jr., attorney for pl'ff in error.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to two hundred and seventy-seven (277) both inclusive, to be a true, perfect, and complete transcript and copy of the record and proceedings, and of all thereof, heretofore filed or entered of record in said court and in a certain cause lately in said court pending wherein The Creede and Cripple Creek Mining and Milling Company was plaintiff, and The Uinta Tunnel Mining and Transportation Company was defendant, as fully and completely as the same still remain on file and of record in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at Denver in said district, this 9th day of May, A. D. 1902.

Seal United States Circuit Court, District of Colorado.

ROBERT BAILEY, *Clerk.*

Filed May 22, 1902.

JOHN D. JORDAN, *Clerk.*

191 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing printed record of one hundred ninety pages in the case The Uinta Mining and Transportation Company, plaintiff in error, *vs.* The Creede and Cripple Creek Mining and Milling Company, No. 1762, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at office in the city of St. Louis, Missouri, in the eighth circuit, this seventh day of January, A. D. 1903.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

192 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the September term, 1902, of said court, begun and held at the United States court house in the city of Denver, Colorado, on the first Monday in September, to-wit, the first day of September, A. D. 1902, and which said September term, 1902, was adjourned from the city of Denver, Colorado, to the city of St. Louis, Missouri, as provided by law, before the Honorable Henry J. Caldwell, Honorable Walter H. Sanborn, and the Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore—to-wit: a transcript of record pursuant to a writ of error directed to the circuit court of the United States for the district of Colorado, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Uinta Tunnel Mining and Transportation Company was plaintiff in error, and The Creede and Cripple Creek Mining and Milling Company was defendant in error, which said transcript of record was filed and docketed in said circuit court of appeals on May 22, 1902, as No. 1762.

That thereafter the following proceedings were had in said cause, in said circuit court of appeals, viz:

193 (*Appearance of Counsel for Plaintiff in Error.*)

And on the twenty-sixth day of May, A. D. 1902, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Plaintiff in Error, *vs.* THE CREEDE AND CRIPPLE CREEK MINING COMPANY.	No. 1762.

The clerk will enter my appearance as counsel for the plaintiff in error.

CHARLES J. HUGHES, JR.
SCOTT ASHTON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1762. The Uinta Tunnel Mining and Transportation Co., pl'ff in error, *vs.* The Creede and Cripple Creek Mining Co. Appearance

Filed May 26, 1902. John D. Jordan, clerk. Charles J. Hughes, Jr., Scott Ashton, counsel for pl'ff in error.

(*Appearance of Counsel for Defendant in Error.*)

And on the twenty-eighth day of May, A. D. 1902, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING COMPANY. } No. 1762.

194 The clerk will enter my appearance as counsel for the defendant in error.

C. S. THOMAS.
W. H. BRYANT.
H. H. LEE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1762. The Uinta Tunnel Mining and Transportation Co., pl'ff in error, *vs.* The Creede and Cripple Creek Mining Co. Appearance. Filed May 28, 1902. John D. Jordan, clerk. C. S. Thomas, W. H. Bryant, H. H. Lee, counsel for def't in error.

(*Stipulation to Correct Writ of Error and Citation.*)

And on the seventh day of June, A. D. 1902, a stipulation to correct the writ of error and citation was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *Eighth Judicial District,* } *ss:*

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

THE UINTA TUNNEL MINING AND TRANSPORTATION Company, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company, Defendant in Error. } Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the citation and writ of error heretofore filed in the above entitled cause, may be amended and

changed to read as follows: "The Creede and Cripple Creek Mining and Milling Company," instead and in place of, "The Creede and Cripple Creek Mining Company," as the same is now addressed, and the court is hereby requested to enter an order directing such change to be made by the clerk of this honorable court.

CHARLES J. HUGHES, JR., AND
SCOTT ASHTON,
Attorney for Plaintiff in Error.
H. H. LEE,
Attorney for Defendant in Error.

Dated at Denver, Colorado, May 31st, 1902.

195 (Endorsed:) No. 1762. In U. S. circuit court of appeals. The Uinta, Tunnel Mining and Transportation Co., *vs.* The Creede and Cripple — Mining & Milling Co. Stipulation to correct writ of error and citation. Filed Jun- 7, 1902. John D. Jordan, clerk. Charles J. Hughes, Jr., and Scott Ashton, att'ys for pl't'ff in error.

(*Order Correcting Writ of Error and Citation.*)

And on the ninth day of June, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1902.

MONDAY, *June* 9, 1902.

UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING COMPANY. } No. 1762.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard upon the stipulation of counsel for the respective parties for an order to correct the name of the defendant in error in the writ of error and citation in this cause.

On consideration whereof, it is now here ordered by this court, and in pursuance of said stipulation, that the name of the defendant in error be corrected in the writ of error and citation in this cause, so that the same shall read "The Creede and Cripple Creek Mining and Milling Company," instead of "The Creede and Cripple Creek Mining Company."

(*Appearance of Counsel for Plaintiff in Error.*)

And on the first day of September, A. D. 1902, an appearance of

counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

196 United States Circuit Court of Appeals, Eighth Circuit.

UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Plaintiff in Error, *vs.* CREEDE AND CRIPPLE CREEK MINING AND MILLING Company.	No. 1762.

The clerk will enter my appearance as counsel for the plaintiff in error.

GERALD HUGHES.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No 1762. Uinta Tunnel Mining and Transportation Co., pl'ff in error, *vs.* Creede and Cripple Creek Mining and Milling Co. Appearance. Filed Sept. 1, 1902. John D. Jordan, clerk. Gerald Hughes, counsel for pl'ff in error.

(*Order of Submission.*)

And on the first day of September, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures, following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1902.

MONDAY, *September* 1, 1902.

UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Plaintiff in Error, *vs.* THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company.	No. 1762.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing in advance of No. 1757, United States *v.* Gentry, by agreement of parties, argument was commenced by Mr. Gerald Hughes for plaintiff in error, con-
197 tinued by Mr. H. H. Lee for defendant in error and concluded by Mr. Scott Ashton for plaintiff in error.

Thereupon, this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the eighteenth day of November, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to-wit:

198 United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1902.

THE UINTA TUNNEL MINING AND TRANSPORTATION Company, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company, Defendant in Error. } No. 1762.

In error to the circuit court of the United States for the district of Colorado.

Mr. Gerald Hughes and Mr. Scott Ashton (Mr. Charles J. Hughes, Jr., was with them on the brief) for plaintiff in error.

Mr. H. H. Lee (Mr. C. S. Thomas, Mr. A. T. Gunnell, Mr. W. H. Bryant, Mr. T. M. Patterson, Mr. E. F. Richardson and Mr. H. N. Hawkins were with him on the brief) for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Syllabus.

1. Mining—Tunnel-site claimant need not adverse lode claim.—The claimant of a tunnel site located across lode claims is not required by sections 2325 and 2326, Revised Statutes, to file an adverse claim, when applications for patents of the lode claims are made, in order to protect his rights in those cases in which his interest in the lode claims is so uncertain, contingent and intangible that it cannot be fairly litigated when the applications are made.
2. Mining—Patents of lode claims subject to rights of claimants of tunnel sites located before the entries.—Patents of lode mining claims based on entries made after the location of a claim for a tunnel site across them are subject to the rights of the claimants of the tunnel site in cases in which his rights therein were so uncertain, contingent and intangible that they could not be fairly litigated when the applications for the patents were made.

199 3. Land Department—Mining claims—Entries and patents—Estoppel.—The judgments of the Land Department permitting entries of land and the patents based upon those entries bind all the parties to the proceedings which resulted in them and all those claiming interests acquired from such

parties subsequent to the entries. But they do not estop those who were not, and were not required to be parties to the proceedings from establishing by the customary evidence the truth relative to any fact material to their claims in any litigation between them and the holders under the patents.

4. Mining—Entries and patents of lode claims constitute no estoppel of the owner of a prior tunnel claim.—Entries and patents of lode mining claims in proceedings to which a claimant of a tunnel site, located across them prior to the entries, was not, and was not required to be a party will not estop him from establishing by the testimony of witnesses who know, and by other customary evidence, the fact that no discoveries of lodes or mines of mineral had been made in the lode claims before the claim for the tunnel site was located across them.

5. Certificates of location not conclusive evidence of facts they recite.—Certificates of location of mining claims are not conclusive evidence of the facts which they recite against parties who claim the land they describe adversely to their makers.

Statement.

The writ of error in this case challenges the trial of an issue involving the rights of the respective parties to the action to the possession of the space within the bore of a tunnel where it passes through two lode mining claims beneath the surface of the earth. The Creede and Cripple Creek Mining and Milling Company was the plaintiff and The Uinta Tunnel Mining and Transportation Company was the defendant in the action below, and they will be so styled in this statement and in the opinion which follows. The plaintiff was the owner of two lode mining claims called the Ocean Wave and the Little Mary, which were entered for patent on August 5, 1892, and were patented on December 21, 1893. The plaintiff alleged in its complaint that these claims were duly located and discovered on January 2, 1892. The defendant was the owner of a claim to a tunnel site which extended through these lode claims beneath the surface of the earth and which was located on January 13, 1892. It also owned certain lode claims which had been located on blind veins that had been discovered in the tunnel after the lode claims of the plaintiff had been patented. The mining claims of the plaintiff were between the portal of the tunnel and the defendant's lode claims and the latter had driven its tunnel through the plaintiff's claim and was using it as a way to bring to the surface of the earth the ore it was extracting from its blind veins. The real issue was whether or not the defendant had the right of way
200 along the bore of its tunnel through the lode claims of the plaintiff, and the determination of this issue depended upon the priority of their respective claims. The plaintiff asserted that its claims were discovered and located on January 2, 1892. The defendant averred that its tunnel was located on January 13, 1892, and that no discovery of mineral in rock in place was made within the

lode claims of the plaintiff until after its tunnel site was located. These averments of the defendant were stricken from the answer and the evidence which it offered to sustain them was rejected. Exceptions were taken to these rulings and there was a verdict and judgment for the plaintiff

SANBORN, circuit judge, after stating the case as above, delivered the opinion of the court:

When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question, whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site, open to determination by means of evidence or testimony *de hors* the patents? This is the principal question presented by this record. If the query were whether or not it is competent to show by proof outside the receiver's receipts or the patents that there had been no location of the patented claims or no discovery of the lodes therein before they were entered for patent, there would be no doubt that a negative answer must be returned to the question for the reason that this is an issue between the parties to a proceeding before the Land Department which that tribunal necessarily considers and decides when it permits the entries of the lands, and its decisions of questions within its jurisdiction are impervious to collateral attack. *King v. McAndrews*, 111 Fed. 860, 863, 50 C. C. A. 29, 32. This was the question which the Supreme Court answered in *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U. S. 499, 502, 503, 510, and while, if the language of the opinion in that case is carelessly read without knowledge of, or reference to the question actually before the court, it may seem to be broader, a careful examination of the facts which the record there discloses demonstrates the proposition that the decision went no farther. In that case the receiver's receipts on the lode claims of the appellee had been issued before the claim to the tunnel site was located. (Page 502.) In a proceeding between the lode claimants and the United States the Land Department had decided that mineral in place had been discovered within the claims and had permitted their entry. Subsequent to this decision and to these entries the owner of the claim to the tunnel site located it across the lode claims and upon the trial offered to prove that there had been no discovery of mineral in place within those claims before they were entered. The trial court rejected the offer. The Supreme Court said: "The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked." Thus, it may be seen that the only proposition there decided was that one who had initiated no claim upon lands when they were entered by other claimants could not subsequently collaterally attack the decision of the Land Department that there had been a discovery of
201 mineral in place upon the claims at some time before they were entered.

Counsel for the plaintiff rely upon the decision and opinion in this case and insist that it fairly sustains the rulings of the court below. But there are radical and controlling differences between the question presented in that case and the issue of law before us in the case in hand.

1. A judgment is binding upon the parties to the proceeding in which it is rendered and upon their privies. The parties to the judgments of the Land Department by which it allowed the entries of the lode claims in the case of the gold mining company were the United States and the owners of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees. They estopped all parties who initiated claims upon, or interests in the lands under either of the parties to the proceeding subsequent to the judgments of the Land Department. The claimant of the tunnel site in that case initiated his claim under the United States, one of the parties to that proceeding, subsequent to the judgments. It was therefore a privy of the United States and was estopped by the judgments of the Land Department from proving that no discoveries had been made upon the lode claims before these judgments were rendered. This is not the case in the action before us. The claim to the tunnel site was located on January 13, 1892. The judgments of the Land Department allowing the entries were rendered on August 5, 1892. At that time there were three parties interested in the land, the lode claimants, the United States and the claimant of the tunnel site. Two of these parties, the lode claimants and the United States, were parties to the proceedings and were estopped by the judgments and the patents. One of them was not a party to any of these proceedings, to the judgments or to the patents and, upon familiar principles, was neither bound by them nor estopped by them from presenting and proving according to the established rules of evidence in trials under the common law the fact that no discoveries had been made on the lode claims before the location of its tunnel site, the fact essential to the validity of its claim upon, and interest in the land.

Not only was the claimant of the tunnel site not a party to the proceedings in the Land Department which resulted in the entries and patents to the lode claims, but it was neither required to become such a party nor to submit its claims and interests in the lands to the adjudication of that department at that time because its rights therein were then too uncertain, contingent and intangible for determination. When the applications for the patents of the lode claims were filed, the blind veins which have induced the use of the tunnel through the lands in controversy had not been discovered, the tunnel had not been driven into the land and it was impossible to know whether or not the claimant of the tunnel site would ever acquire any right to use this land for the purpose to which it is now devoted. The claimant of a tunnel site is not required by sections 2325 and 2326, Revised Statutes, to file an adverse claim and submit his rights in the lode claims it crosses to

adjudication by the Land Department upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent and intangible. *Enterprise Min. Co. v. Rico-*
202 *Aspen Min. Co.*, 167 U. S. 108, 112; *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 13 C. C. A. 390, 399, 400, 66 Fed. 200, 209, 210.

2. The issue whether the discoveries in the lode claims were made before the location of the tunnel site in the Ajax Gold Mining Company's case was necessarily considered and adjudged by the Land Department when it permitted the entries of the lode claims. The finding that such discoveries had been made before the date of the entries was indispensable to the decision that the lode claimants were entitled to make the entries so that that finding must have been made by the department. But the location of the tunnel site in that case was subsequent to these entries. Hence the finding that the discoveries were made before the entries was necessarily a finding that they were made before the location of the tunnel site and it was, as we have seen, binding upon the claimant of the tunnel site, because it was claiming a right initiated after this adjudication under a party to the judgments.

It is not so in the case before us. The question here is whether or not discoveries were made in the lode claims prior to January 13, 1892, the date of the location of the claim to the tunnel site. The determination of this question was neither indispensable nor material to the adjudication made by the Land Department on August 5, 1892, that the lode claimants were entitled to enter the land, and there is nothing to show that this issue was ever considered or decided by that department in reaching its conclusion. The only question relative to the discoveries that it was required to determine was whether or not they had been made prior to August 5, 1892, when the entries were permitted, and the decision of that question left entirely untouched the issue in this case whether they were made before or after the location of the tunnel site on January 13, 1892.

3. When the entries were made in the Ajax Gold Mining Company's case no claim to a tunnel site had been located or staked upon or across the lode claims and the entries of them and the patents to them vested the title in the claimants free from any right or claim to a tunnel site.

It is otherwise in the case at bar. The claim to the tunnel site was located and staked out across these lode claims before they were entered. Under the Revised Statutes and the law the entries and patents of these claims vested the title to them subject to the rights of the prior claimant of the tunnel site just as they vested it subject to the right of an owner of an adjoining lode claim to follow on its dip through a side line and through the patented territory of these lode claimants any vein which has its apex in his claim. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 13 C. C. A. 390, 400, 66 Fed. 200, 210; *Mining Co. v. Campbell*, 135 U. S. 286, 301; *Hall v. Mining Co.*, Morr. Min. Rep. (3d ed.) p. 282; *Branagan v. Dulaney*, 8

Colo. 408, 412; *Lee v. Stohl*, 9 Col. 208, 210; *Morgenson v. Milling Co.*, 11 Colo. 176, 179.

While, therefore, it is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests, it is no such attack to assert the rights of the claimant of a tunnel site located before the entry of the land against a patent of it to a lode claimant, because under the statutes and the law such a patent always issues subject to those rights.

203 Notwithstanding all these considerations counsel for the plaintiff insist that the defendant is estopped from pleading and proving that no discoveries of mineral in place were made in the lode claims before the location of the tunnel site on January 13, 1892, because certificates of location of the lode claims were filed on January 2, 1892, which declare that such discoveries were made on that day and it is a well-settled principle that patents relate back to, and take effect upon the dates of the initiation of the rights on which they are founded.

But the certificates of location are not conclusive proof of the facts which they recite against those asserting rights adverse to their makers. They are competent evidence of the fact that they were made and filed and hence of an important link in the chain of the plaintiff's title. But when the existence of the facts which they recite is challenged they are but the *ex parte* statements of interested parties and there is nothing in them or in their relation to the property or the parties to bind those claiming the lands adversely to their makers or to estop them from establishing the truth by the customary oral and written evidence.

Nor is there anything in the doctrine of relation to work such an estoppel. Grant that the patents relate back and take effect as of the date of the initiation of the lode claims, yet since the patents are subject to the rights of the claimant of the tunnel site when they are issued they are still subject to those rights when they have related back to the inception of the claims upon which they rest.

Moreover, the averment of the defendant is that no discoveries were made in the lode claims until after the location of its claim to the tunnel site. If this allegation is true, it may be doubted whether the lode claims can be said to have been initiated before the claim for the tunnel site was located. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. Stat., § 2320; *Enterprise Min. Co. v. Rico-Aspen Min. Co.*, 167 U. S. 108, 112. It is true that subsequent discoveries may validate earlier locations and that the latter may then inure to the benefit of the locators as against the United States and all parties whose claims were initiated subsequent to the discoveries. But they would inure to their benefit as of the dates of the discoveries and not as of the dates of the locations and they would neither destroy nor affect intervening rights. The marking of boundaries and filing of location certificates may precede discovery or discovery may precede them, but no location is valid until both are complete. The earlier act then inures to the benefit of the

locator as of the date of the later, subject to all rights which have intervened between them. *Erwin v. Perego*, 35 C. C. A. 482, 485, 93 Fed. 608, 611; *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. 666, 676; 4 Morr. Min. Rep. 411, 423; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522, 531; *Zollars v. Evans*, 5 Fed. 172, 175; *Strepy v. Stark*, 5 Pac. 111, 114; *Thompson v. Spray*, 72 Cal. 528, 533; *Erhardt v. Boaro*, 113 U. S. 527, 536. There was, therefore, no valid location of the lode claims until the discoveries within them were made and it is held by the circuit court of appeals of the ninth circuit in *Last Chance Mining Co. v. Tyler Min. Co.*, 61 Fed. 557, 565, 9 C. C. A. 613, 621, that a patent for a mining claim only relates back to the time when a valid location was first made. If this is a correct view of the law, the patents in this case could not relate back to a time anterior to the dates of the discoveries, and if
204 those were subsequent to the location of the tunnel site they could not affect defendant's rights.

If litigation for the possession of the property in controversy in this action had arisen between the lode claimants and the claimant of the tunnel site at a time prior to the entries of the lode claims, the question whether or not discoveries of mineral in place had been made in the lode claims before the location of the tunnel site would have been decisive of the issue and the testimony of witnesses who knew the facts and other evidence competent in the customary trials of such issues at law would have been admissible to determine the question. What is there in the entries and the patents to deprive the defendant of its right to try this issue now upon like evidence? Its claim to this land had attached before those entries were made. It was not a party to the proceedings in the Land Department which resulted in the adjudication that the lode claimants were entitled to enter it. It was not required to file an adverse claim and to submit its rights to the adjudication of that department when the applications for the patents were made. The adjudication of the Land Department which permitted the entries was *res inter alios acta* and ineffectual to estop the defendant. The department was not required to determine, and it did not decide the question here at issue, and under the statutes and the decisions of the Federal courts the entries and the patents were made subject to the rights of the claimant of the tunnel site which had attached before the Land Department permitted the entries. Our answer to the question which this case presents is, that when the claim to a tunnel site has been located before the entry of conflicting lode claims, which have subsequently passed to patents, the question whether discoveries of mineral in place were made in the lode claims before or after the location of the claim to the tunnel site was perfected is open to determination by means of the testimony of witnesses and other competent evidence *de hors* the patents in any litigation between the parties involving their conflicting claims. *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. 557, 565–7, 9 C. C. A. 613, 621–623; *Champion Min. Co. v. Consolidated Wyoming Gold Min. Co.*, 75 Cal. 78;

Iron Silver Min. Co. v. Campbell, 135 U. S. 286; *Davis' Adm'r v. Weibbold*, 139 U. S. 507.

The averments that no discoveries of mineral in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant and its evidence to sustain them should have been received. The question which has been considered is decisive of the issue whether or not the judgment below should be affirmed, and, as the other questions presented by the assignment of errors may not arise again, they will not now be considered. The judgment below must be reversed and the case remanded to the court below with directions to grant a new trial, and it is so ordered.

Filed November 18, 1902.

205 (*Judgment.*)

And on the eighteenth day of November, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1902.

TUESDAY, *November* 18, 1902.

THE UINTA TUNNEL MINING AND TRANSPORTATION Company, Plaintiff in Error,
vs.
THE CREEDE AND CRIPPLE CREEK MINING AND MILLING Company. } No. 1762.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, reversed with costs; and that the Uinta Tunnel Mining and Transportation Company have and recover against the Creede and Cripple Creek Mining and Milling Company the sum of two hundred ninety eight and 40/100 dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said circuit court with directions to grant a new trial.

November 18, 1902.

206 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fourteen pages contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, in the United States circuit court of appeals for the eighth circuit, (except the transcript of the record from the circuit court of the United States for the district of Colorado) in a certain cause in said court wherein The Uinta Tunnel Mining and Transportation Company is plaintiff in error and The Creede and Cripple Creek Mining and Milling Company is defendant in error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court at office in the city of St. Louis, Missouri, in the eighth circuit, this seventh day of January, A. D. 1903.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

207 In the Supreme Court of the United States.

THE UINTA TUNNEL MINING AND TRANSPORTATION Company, Petitioner,
vs.
THE CREEDE & CRIPPLE CREEK MINING AND MILLING Company, Respondent.
} Stipulation.

The petition and application for writ of certiorari to the United States circuit court of appeals for the eighth judicial district having heretofore been granted by the above court, and a certified transcript of the record of said cause from the United States circuit court of appeals having heretofore been filed with the clerk of the Supreme Court of the United States upon the application for said writ;

Now, therefore, pursuant to the practice in said court, the said certified transcript of record thus on file may by this stipulation be taken as the return to the said writ, thereby dispensing with the necessity of duplicating the copy thereof.

Dated at Denver, Colorado, this 23rd day of March, A. D. 1903.

A. T. GUNNELL,
W. H. BRYANT,
C. S. THOMAS,
H. H. LEE, *Counsel for Petitioner.*
CHARLES J. HUGHES, JR.,
Counsel for Respondent.

(Endorsed:) No. 1762. The Uinta Tunnel Mining and Transportation Co., plaintiff in error, *vs.* The Creede and Cripple Creek Min-

ing and Milling Co. Stipulation as to return to writ of certiorari. Filed Apr. 9, 1903. John D. Jordan, clerk.

208 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Uinta Tunnel Mining and Transportation Company, is plaintiff in error, and The Creede and Cripple Creek Mining and Milling Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
209 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of March, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

210 *Return to Writ.*

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss*:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The Uinta Tunnel, Mining and Transportation Company, plaintiff in error, *vs.* The Creede and Cripple Creek Mining and Milling Company, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in St. Louis, Missouri, this ninth day of April, A. D. 1903.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 18,837. Supreme Court of the United States. No. 609, October term, 1902 The Creede & Cripple Creek Mining & Milling Co. *vs.* The Uinta Tunnel Mining & Transp'n Co. Writ of certiorari and return Filed Apr. 9—1903 John D. Jordan, clerk. Office of the clerk Supreme Court U. S. Filed Apr. 11 1903.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING CO., PETITIONER,

VERSUS

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO., RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Supreme Court of the United States:

Comes now your petitioner, The Creede and Cripple Creek Mining and Milling Company, and respectfully shows to this Honorable Court that heretofore and at the September term, A. D. 1902, the United States Circuit Court of Appeals of the Eighth Circuit, sitting at the city of St. Louis, in the state of Missouri, considered and determined a certain cause theretofore taken upon a writ of error from the Circuit Court of the United States within and for the District of Colorado, in which The Uinta Tunnel,

Mining and Transportation Company was plaintiff in error and The Creede and Cripple Creek Mining and Milling Company defendant in error.

That the said United States Circuit Court of Appeals, upon the hearing and determination of said cause, reversed the decision of said Circuit Court, as more fully appears in the records of the proceedings in said cause in said United States Circuit Court of Appeals, which are herewith offered for the consideration of the court, a certified copy of the entire record, in conformity with rule 37 of this Honorable Court, being submitted herewith.

Your petitioner is advised, and believes, that the said judgment of said United States Circuit Court of Appeals in said cause is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination, under and in conformity with the provisions of the sixth section of an act of Congress entitled, "An act to establish certain courts of appeal and to define and regulate in certain causes the jurisdiction of the courts of the United States and for other purposes, approved March 3, 1891," the said cause being made final in the said Circuit Court of Appeals by the said act.

Your petitioner shows that in deciding said cause the said Circuit Court of Appeals not only ignored, but ran directly counter to certain principles of law heretofore adjudicated by this court in many cases, and more especially in Calhoun G. M. Co. vs. Ajax G. M. Co., 182 U. S., 499. That said cause was one involving a contest between lode mining claims and a tunnel location upon the public domain and a construction of the several statutes of the United States

relating thereto. That this case which your petitioner seeks to have review involves the identical questions which were passed upon by this court in the above-named cause, inasmuch as this is a controversy arising out of a conflict between a tunnel location and lode claims, and depends for its determination upon a state of facts similar to those which were considered by this court as the basis for its adjudication above mentioned.

Your petitioner, further, shows that the Circuit Court of Colorado determined the cause in keeping with the principles laid down by this court in Calhoun Co. vs. Ajax Co., supra, but that the Circuit Court of Appeals did not follow said rulings, but, upon the contrary, held, in conflict with this court, in the following particulars:

1. The tunnel of the plaintiff in error, as in the Calhoun-Ajax case, was not located until after the two lode claims, the Little Mary and Ocean Wave, through which it was driven, had been located, and though both of the lode claims had passed to patent long before this controversy arose, the United States Circuit Court of Appeals held, in violation of the rule laid down in Calhoun-Ajax case, that testimony might be introduced to show that at the time the tunnel location was made there had been no discovery of ore within the limits of the two claims, and by such testimony fix the date of the relation of the patents to the two claims, not to the date of their location, as announced by this court, but to the date of the subsequent discovery of mineral therein. The trial court having refused to permit such proof to be made, the Court of Appeals has reversed the cause and re-

manded it to the Circuit Court for a new trial, at which such testimony is to be admitted.

2. Your petitioner, further, shows that the said Circuit Court of Appeals ran counter to the decision of this court in its construction of sections 2322-3, Revised Statutes United States, in their relation, one with the other, by holding in this case that, notwithstanding a lode claim had passed to patent, yet, nevertheless, its title was still subject to the right of way of any tunnel which was located prior to the location of the lode claim or prior to the actual discovery of mineral therein, unless the claim had already been entered for patent in the land office.

3. Your petitioner, further, shows that the said Circuit Court of Appeals, in conflict with the rules of law laid down by this court, further held that, notwithstanding the absolute grant by the patent of the United States to the claim owner of all veins of every description apexing within his lines, a tunnel claimant was entitled to enter and enjoy certain of them, provided his tunnel was located prior to the location of the claim, or prior to the discovery of mineral therein, unless there had been an entry of the same for patent in the land office.

4. Your petitioner, further, represents that the Circuit Court of Appeals, in this cause, held and decided that, if at the time of the entry of a lode claim for patent, *the rights of an adverse tunnel claimant were so uncertain, contingent and intangible* as that, they could not be fairly litigated, he was not bound or concluded by the patent issued upon such entry.

Your petitioner, further, shows to this court that this case, being identical with the Calhoun-Ajax case,

remained upon the docket of the Circuit Court in and for the District of Colorado until this court should have passed upon said sections of the statute, their relation to one another and application to a controversy of this character. These questions having been determined by this court, they were relied upon by this petitioner, and said Circuit Court, as rules of law for their guidance in the determination of this case; and that in keeping therewith, those matters and things set forth in the answer of the plaintiff in error, which were in conflict with the said decision, were stricken out and the case tried and determined upon the issues remaining.

Your petitioner says that to permit the decision of the United States Circuit Court of Appeals to stand in this case would work a great hardship upon your petitioner by reason of the fact that it does not conform to the decisions of this court, and deprives your petitioner of all the advantages which it is entitled to thereunder. It would, furthermore, render the law so uncertain that both litigants and courts alike will be unable to determine what course to pursue in such cases.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Ap-

peals in the said case therein entitled The Uinta Tunnel, Mining and Transportation Company, appellant, and The Creede and Cripple Creek Mining and Milling Company, respondent, No. 1762, to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled, "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever so pray.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for the Petitioner.

STATE OF COLORADO, COUNTY OF ARAPAHOE,
CITY AND COUNTY OF DENVER, ss.

....., being first duly sworn, upon oath, deposes and says, that he is one of the attorneys for petitioner, The Creede and Cripple Creek Mining and Milling Company; that he

has read the above petition and knows the contents thereof, and that the same is true of his own knowledge, information and belief.

.....

Subscribed and sworn to be before me this .... day of January, A. D. 1903.

My commission expires December 13, 1906.

....

Notary Public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING CO., PETITIONER,

VERSUS

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO., RESPONDENT.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In support of the petition for writ of certiorari, The Creede and Cripple Creek Mining and Milling Company relies upon the decision and opinion of this court in the case of Calhoun Gold Mining Company vs. Ajax Gold Mining Company, 182 U. S., 499, and the unbroken line of decisions upon which it is founded which establish the doctrine that a patent

to mining claims issued under the Federal Statutes relates back to the date of the location thereof, and is conclusive as to all facts and conditions to which its issuance is essential. The two cases involve the same questions of law, except that in the Calhoun-Ajax case was involved also the question of cross-lodes, which does not arise here. The properties in controversy in both cases are located in the same mining district, and the two causes were originally instituted in the same tribunal. This cause was transferred, on the ground of citizenship, to the United States Circuit Court for the district of Colorado, and there remained without being tried until the decision was handed down in the Calhoun-Ajax case. After that it was brought on for trial and determined in keeping with the decision in that cause, it having become a rule of property on which this petitioner had a right to rely.

This is a controversy between a tunnel claim and two patented lode claims, both of which were located prior to the date of the location of the tunnel. The tunnel claimants insisted upon their right, notwithstanding the two lode claims had passed to patent, to prove that on the date of the location of the tunnel claim there was no discovery of mineral in either of the lode claims, and that, therefore, the apparent priority of the lode claims could be attacked by parol testimony.

It was further contended by the tunnel claimant that if the tunnel was located before the discovery of mineral in the lode claims, that it was entitled to a right of way through the lode claims, even after they had passed to patent.

The plaintiff in error, among other defenses, alleged that there never was at any time a discovery of mineral within the Little Mary and Ocean Wave lode claims, but that the patents to the same had been obtained by some persons through fraud. These defenses, upon motion, were stricken out, and the only issue remaining being that of ownership upon the part of The Creede and Cripple Creek Mining and Milling Company, at the trial of the case, upon the introduction of patents of the United States and sufficient title deeds the court instructed a verdict in behalf of the defendant in error.

There are two important questions of law to be determined in deciding this case.

1. After a lode claim has been patented under section 2322, does section 2323 modify the preceding section, and give tunnel claimants either a right of way through or a right to blind veins within the limits of the patented lode claim?

2. After a lode claim has been patented, to what date does the patent relate, the date of the *location* of the claim, or some other date *to be fixed by parol testimony* without reference to the title or patent of the claim?

These are the most vital questions in the case, and the trial court, believing that they were decided definitely and directly by the decision in the Calhoun-Ajax case, ruled in the negative upon each of them. The United States Circuit Court of Appeals, however, notwithstanding the plain and explicit language of this court, finding a slight difference in the history of the titles of the lode claims in the Calhoun-Ajax

case to those in this case, differentiated between the two cases and reversed the decision of the court below. The only difference between the two cases being the point upon which the United States Circuit Court of Appeals relied is that in the Calhoun-Ajax case the two lode claims had been entered for patent before the tunnel location was made, while in this case, though the lode claims were located before the tunnel, they were not entered for patent until after the tunnel location was claimed to have been made. This court, however, did not base its opinion and decision in the Calhoun-Ajax case upon any such ground, but expressly say that the patents "*related back to the date of the locations of the claims.*"

This court, in considering one of the assignments of error in the Calhoun-Ajax case, says that it relates to

> "rights claimed by plaintiff in error by the location of the tunnel site, and presents the questions whether such location gave to the plaintiff in error the following rights of way through the lode claims of defendant in error, of possession of the blind veins cut by the tunnel underneath the claims of the defendant in error."

In its brief the plaintiff in error disclaimed any right to any blind veins that might have been cut in the Ocean Wave and Little Mary claims, limiting its claim to the right of way through the two above mentioned claims for the purpose of mining properties situated beyond them, which was one of the proposi-

tions and contentions made and passed upon in the Calhoun-Ajax case. In discussing it this court said:

> "The plaintiff in error asserts the right of way for its tunnel under section 2323 by implication, and from that implication and the rule it contends for in cross veins, deduces its right to all the blind veins. The contention as to cross veins we have answered, and the deduction as to blind veins is not justified. * * * And there can be no implication of conflict with the rights given by section 2322. *The exclusiveness of those rights we have declared. The tunnel can only be run in subordination to them. How else can section 2322 be given effect?* There are no exceptions to its language. The locators of any mineral vein, lode or ledge are given not only an exclusive right of possession and enjoyment of all the surface included within the lines of their locations, but of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically. A locator, therefore, is not confined to the vein upon which he based his location and upon which the discovery was made."

And again this court has said

> "The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defend-

> ant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on the statutes of Colorado it is disposed of by their interpretation by the Supreme Court of Colorado."

This case and the Calhoun-Ajax case alike raised this question of the right to drive and operate a tunnel through the limits of a lode claim which has already passed to patent. The question as to the date of the relation of the patent does not and can not apply. If in the Calhoun-Ajax case, in which the relation of the two sections of the United States Revised Statutes above referred to was settled by saying that section 2322 gave exclusive rights, the full effect of which could not be qualified by the succeeding section, then the decision of the Court of Appeals remanding this cause for a new trial, that evidence might be taken, which, under any rule of construction of law or conclusion of fact, might permit the tunnel to be driven through these patented claims was in direct conflict with the law as defined by this court.

The Court of Appeals also held in its opinion that wherever a patent of a lode claim is based upon an entry in the land office, made after the location of a tunnel site across it, that it is subject to the rights of the tunnel in cases where such rights were so *uncertain, contingent and intangible* that they could not fairly be litigated when the application for patent was made. What this language may mean in its entirety it is impossible now to say, but one thing is does mean, and that is that a possessory title, notwith-

standing the repeated adjudications of the state and federal courts, under the mining law is nearly worthless, and it says also in unmistakable terms that a patent of the United States only relates back to the date of the application therefor, which is equally novel as a proposition of mining law. Never before have the *uncertainty* and *intangibility* of a claimant's right given them in the eyes of the law an additional value or permitted him to be lax or dilatory in their assertion. In the present case, however, the tunnel claimant asserts that his rights are certain and tangible and have existed and been perpetuated from a time prior to the inception of the rights of the lode claimant. The Rico-Aspen case is wholly dissimilar. There the conflict was unforeseen and unexpected. Here there was an adverse claim of right from the very beginning, one that it is claimed was never *uncertain* or *intangible*.

In addition to the foregoing the Court of Appeals held that entries and patents of lode claims in proceedings to which the claimant of a tunnel site located across them prior to the entries was not a party will not estop him from establishing by the testimony of witnesses who know the fact that no discovery of lodes was made in the claims before the tunnel site was located across them.

This is also an attempt to invoke the decision of this court in Enterprise Mining Company vs. Rico-Aspen Consolidated Mining Company, 167 U. S., 108, but that case was, in every particular, so different from the case at bar that it does not determine or decide any question at issue here.

The gist of the decision of the Court of Appeals is this: That, notwithstanding the decision of this court the patent does not relate back to the date of the location, but relates to some other date which shall be fixed by parol testimony. The evidence in this case showed the date of the location of the two patented claims and that it was prior to the alleged location of the tunnel. In the Calhoun-Ajax case this court said upon page 509 of the report:

> "An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in two of the patented claims of the defendant in error, to wit, the Monarch and Mammoth Pearl. The ruling was right. *The patents were proof of the discovery and related back to the date of the location of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary.*"

In the face of this language which, with the exception of the names of the two claims, is applicable literatim et verbatim to this cause, the Court of Appeals decided with this language before it that the patents did not relate back to the date of the location, but to some other date that might be fixed by parol testimony, provided it was a date prior to the day of entry. To show the uncertainty of such a holding we may be pardoned for asking whether proof that there was no discovery of mineral would be admissible only

for any day earlier than the day of entry, or would it be permissible under this doctrine to prove that there was no discovery of mineral even on the very day of entry, provided that proof related to some hour before the hour of filing? If this is the true doctrine, proof would first have to be made of the exact moment of the application in the land office, and, that being fixed, no period of time, however brief, prior thereto, if the evidence related only to it, would be inadmissible.

The dangerous absurdity of such reasoning is too obvious to require comment.

If the argument were further carried out, what infinitesimal period of time would the courts fix within which a patent might or might not be attacked prior to the date of the application therefor?

The reasoning of the Court of Appeals, if sound, is as applicable to the facts in the Calhoun-Ajax case as in this. For it is impossible to conceive of any reason whereby the distinction between the two cases can be entertained. "The issue," says that court, "whether the discoveries were made before location of the tunnel site in the Ajax company's case was necessarily considered and adjudged by the Land Department when it permitted the entries of the lode claims."

Is it not equally true that the same things were "necessarily considered and adjudged" by the same authority when it permitted the entries of the lode claims of the Creede and Cripple Creek Company? Can it be possible that it did not so "consider and adjudge" in this case, merely because *before the entry* the Uinta tunnel had been located, and that in the Ajax case it did so consider and adjudge merely be-

cause *after the entry* the Ithaca tunnel had been located?

"The finding that such discoveries had been before the date of the entries was indispensable to the decision that the lode claimants were entitled to make the entries, so that that finding must have been made by the department." To that we give hearty assent, and insist that it is equally true as to the entries here. But how does the Court of Appeals distinguish? That court continues:

> "But the location of the tunnel site in that case was subsequent to these entries. Hence the finding that the discoveries were made before the entries were made was necessarily a finding that they were made before the location of the tunnel site, and it was, as we have seen, binding upon the claimant of the tunnel site, because it was claiming a right initiated after this adjudication under a party to the judgment."

We are wholly unable to perceive the distinction. The action of the department is either conclusive, or it is not, and whether it is or is not surely can not be made to depend on the circumstance that the tunnel site, instead of being located after the location of the patented claim, was located after its entry. Such conditions would overthrow the permanency of all titles, and make them dependent on extraneous facts, liable to disclosure long after the evidence of their non-existence had been lost or destroyed.

Certainly the language above quoted could not have been more definite when the identity of the two suits in this particular is taken into consideration, and it should have been held conclusive in this case. Therefore, if it is true that the patent when granted relates back to the date of the location, how can any attack be made upon the title of the claim between the date of the location and the date of entry without its being an attack upon the patent. It has been so often held and so conclusively determined that a patent is proof of discovery that we are at a loss to understand how parol testimony questioning the discovery can be anything, also, but an attack upon the patent. If the patent, as a matter of law, relates back to the date of location, how is it possible or permissible by parol evidence to make it relate back to some other date?

If a patent relates only to the date of entry, then it grants only a fee indefeasible back to that date, while before that date it is open to question and attack, notwithstanding the United States has passed upon it and pronounced it perfect by its patent. If this be the rule, then the government grants only a fee in form, which may at the time be absolutely worthless, by reason of the existence of secret easements which years afterward may be successfully asserted. We are asked to believe that the government solemnly gives a patent to its mineral lands to a citizen, granting him the fee with the proviso that any one may have the right hereafter to prove an easement or right which will take all the ore and leave the fee an empty shell and a hollow mockery. And yet we are gravely told that this is not a collateral attack on a patent.

It may perhaps be said that the *patent* still remains. This may be true, perhaps, as to the paper part, the seals and the recitals, but of what use are these boasted guaranties if the minerals, which alone make the property valuable, can be seized upon by a flank movement and carried away?

The statutes of Colorado, as this court is well aware, provide a certain formula which must be observed in the making of the location of any mining claim. First, there must be a discovery within the limits of the claim, and within a specified time from the date of such discovery the location must be made. The law gives to the miner time from the date of the discovery of mineral to prospect his lode, determine its course and direction, its commercial or speculative value, and anything affecting its desirability as a mining property. He must then, if he so elect, inaugurate his location by filing a location certificate in the county clerk and recorder's office of the county wherein the lode is found. This location certificate must contain certain specified things—the name of the claim, the name of the locator, the date of the location, the number of feet in length, and a certain description by metes and bounds. It is the first public claim of the title of the locator which is recorded, and if it is based upon a discovery of mineral establishes a good title. When the government of the United States, through its proper department, afterwards grants a patent thereto, it is an adjudication not only that there was mineral discovered and disclosed within the claim at or before the date of the location, but that all of the acts necessary to segregate it from the public domain have been complied with. When

the title once becomes complete by the granting of patent it is and should be unassailable from location to patent. As this court has said, it has been decided too often to be necessary to cite authority in its support, but before leaving the subject we desire to refer to the texts of Judge Lindley, and of Barringer and Adams, and to make the two following quotations therefrom:

> "It is accepted, as a well-established rule of law, that the title conveyed by a mining patent relates back to the *inauguration* of the right; that is, to the *location* upon which the patent proceedings are based."
>
> Lindley on Mines, volume 2, page 975.

> "The patent being simply the evidence of the grant, when it had been issued, takes effect by relation as of the *first initial step* in the acquisition of the title; that is, the *original location,* at least so far as to cut off intervening rights * * *."
>
> Barringer and Adams on Mines, page 417.

Also, in

> Davis, Admr. vs. Weibbold, 139 U. S., 530.

This court, in summing up a case, wherein there was a contest between a lode claim patented and a town site, said, speaking of the lode claim: "The patent which subsequently followed was a mere per-

fection of the right *originated by the location and to which it took effect by relation.*" And cited with approval several cases holding to the same rule.

The doctrine of relation which the Court of Appeals has asserted in this case, by holding that a patent relates only to the date of the application for the same, instead of the date of the location, was not invoked by the plaintiff in error in its answer. We contend that, it not having been pleaded or included within the parts of the answer which were stricken out, the appellate court was without authority to pass upon it, even though it was argued at length in the briefs. The only allegations in the answer which affected this matter were the bald assertions that these two claims were never at any time located or discovered by the locators, or any one else, *but that certain people managed by fraud to get a patent from the United States* therefor. There was no allegation in the pleadings that would serve as a basis for the decision of the Court of Appeals that there was no discovery, and therefore no sufficient location of the lode claims at the date of the location of the tunnel site. Certainly whatever the construction of the law may be, a defense that two claims patented by the United States government have never been properly located or discovered, and that the patents have been procured by fraud, when made collaterally, should not be allowed to stand, nor should an appellate court, when reviewing the proceedings by which they were stricken out, announce any doctrine as to the relation of the patents for justification of its decision.

This question as to the time of the relation of the patent is entirely an afterthought. At any rate it is not by any means similar to the matters and things which were stricken from the answer. There was no allegation that the discovery was made some time between the date of location and the issuance of patent, and that, therefore, the latter related to that date, but it was alleged that the Ocean Wave and Little Mary lode claims were not, and never were, either of them, located upon any discovery of vein or veins, and that no mineral vein was ever discovered or uncovered in the discovery shaft of either of them. It denied that the patent related back or took effect, either from the date of discovery or location, for any purpose or for all purposes, or that there was ever made, at any time, by any person, any location of these two claims. This was not an attempt to fix the time to which a patent might relate, but was an attempt, and the only one made by way of defense, to run counter to the express terms of the patent, and to tender as an issue the proof that it was fraudulently issued, without authority and without a proper basis in fact or in law for its support, and all this was sought to be done by collateral attack. These sections of the answer to which we have referred are the fifth and sixth paragraphs, pages 61-62, printed record.

If the decision of the Court of Appeals in this case, together with the accompanying opinion, is permitted to stand, in conflict, as it is, with the utterances of this court upon the same subject, it will produce

endless confusion, long and protracted litigation, to the great injury not only of the petitioner herein, but to other litigants and mine owners throughout the United States.

All of which is respectfully submitted.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 362.

THE CREEDE AND CRIPPLE CREEK MINING COMPANY, Petitioner,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Respondent.

REPLY BRIEF OF PETITIONER.

CHARLES S. THOMAS,
WM. H. BRYANT,
HARRY H. LEE,
Attorneys for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1902

Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 609.

THE CREEDE AND CRIPPLE CREEK MINING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

REPLY BRIEF OF PETITIONER.

The respondent's citation from Forsyth *vs.* Hammond, 166 U. S., 514, emphasizes the necessity presented by this record for the issuance of the writ; for "the circumstances of the case" will, we think, satisfy the court not only of "the importance of the question involved," but also of "the necessity of avoiding conflict between two courts of appeal." If the decision herein complained of shall stand, not only will the integrity of two lode patents of the Government be immediately assailed by parol testimony, but a brood of litigation will gather under the wings of the Federal courts, wherein

so-called tunnel rights will challenge the validity of other patented properties upon the plea that they were "entered" after the tunnels were located on paper. Indeed, we know of no decision in mining law that could be more fruitful of controversy than that of the Court of Appeals in this case if it shall stand unchallenged.

Counsel have sought to establish a distinction between the decision of his honor Judge Sanborn and that of this court in the Calhoun-Ajax case. But neither they nor his honor can do more than to say that in the one case the entry preceded by a short time, and in the other succeeded by a short time, the date of the tunnel location. No such distinction was so much as hinted at in the Calhoun-Ajax decision, and unless this court shall determine that the doctrine of relation as applied to a land patent shall be determined by the date of the entry, the slight difference of fact between the cases can make no difference whatever in the application of the same law to both. Neither a "careless" nor a careful reading of the Calhoun-Ajax decision can lead to any other conclusion.

Counsel say that in the case last referred to "there were only two parties interested in the claims, the locators thereof and the United States," and that as "between these parties the decision of the Land Office was controlling." Were any other parties interested in the application of petitioners? *Their claims were located before the tunnel site.* Their subsequent *entry*, under every decision of *this* court, *related back to the date of location*, and it is wholly immaterial whether the tunnel was located the day before or the day after the entry was made. It is the *location* of the claim, not its *entry*, that determines the right of the owner. It would be a strange anomaly, indeed, if tunnel A, located the day before the entry of claim B, could attack its integrity, while tunnel C, located the day after such entry, would be concluded thereby. Such a doctrine not only violates the decision in Calhoun

vs. Ajax, it is opposed to every authority of this court upon the subject.

It is true, as counsel suggests, that a location certificate of a mining claim, when rejected by statute, is only *prima facie* evidence of the facts recited. But it is equally true that when a patent is lawfully and regularly obtained therefor and thereunder, it relates back to such location. *It takes effect then*, and the recitals of the certificate of location are thereby made conclusive. Thus far this court has never expressly recognized any exception to the rule.

The Tyler-Last Chance case was affirmed here, but upon other grounds exclusively. The question we are considering is not discussed at all. The court construed a previous judgment between the parties thereto as conclusive of the question of priority (157 U. S., 683). We may, therefore, consistently contend that the decision of the Court of Appeals in that case, on the question of relation, was *obiter dictum*. But if we turn to the case as reported in the court below we learn that both of the lode claims in controversy had been previously patented, and the controversy between them concerned extralateral rights claimed by each through their respective locations. They originally conflicted in their external boundaries, one adversed the other's application for patent, a judgment was taken by default, and, the conflict being adjudged to the adversor, both were patented. It would seem that these facts precluded any question as to which claim had the prior right. But the adversed claim being the older location, sought to avoid the consequences of the judgment, and the trial court permitted the parties to offer evidence showing the actual date of discovery in each claim, notwithstanding the patents and the respective dates of location. This procedure was approved by the Circuit Court of Appeals, which said:

"*There is no conflict between them as to surface ground. Both claims are valid and both have the Government title, one by patent; the other by a receipt and certificate of entry from the*

United States Land Office, which as before stated is the substantial equivalent for a patent."

Now we may concede *arguendo* that this doctrine is correct, and it does not affect the question. Here we have a conflict between the tunnel and the lode claims it crosses. Here the lode claims are senior to the tunnel location. Here any question of extralateral right is absent. Here the patent issued on a formal application, and the entry was allowed only on proof of discovery as required by the Department regulations. Here the respondent has driven his tunnel through petitioner's older claims, thus invading premises previously segregated from the public domain by the act of discovery and location and afterwards confirmed by entry.

It may be proper before leaving the Tyler-Chance case to say that the parol testimony there introduced as to the date of discovery was first offered by the Chance people *without objection*. Then when the Tyler claimants sought to rebut such testimony, the Chance people objected, which by reason of these facts seems to have been properly overruled.

The only theory on which the Calhoun-Ajax case can be harmonized with the decision in the case at bar is that by the former it was decided that a patent when issued takes effect only from the date of entry, instead of the date of location. But this would be merely to say that this is no relation whatever, since the entry is virtually the patent itself. *To say that the actual time of discovery instead of the date of location is the time at which the patent takes effect is to say that by parol proof it might be made to take effect subsequent to its date, for the evidence might so determine. On the other hand, such evidence might show that no discovery ever was made. In that event, would it be said the Government title was of no effect whatever?*

His honor Judge Sanborn says "it is a flagrant attack upon a patent to attempt to maintain a claim subsequent

to the entry on which it rests," but that "it is no such attack to assert the rights of the claimant of a tunnel site located before the entry, because, under the statutes and the law, such a patent always issues subject to those rights." We respectfully challenge the statement.

If it be true, a tunnel claimant may make a location of his tunnel within an hour prior to the lode entry and thereby make an attack upon it that is not flagrant, but lawful. If he delays two hours and then attacks, his action is flagrant. Is it not clear that by this decision the doctrine of relation is not modified, but destroyed? The *entry* is the title. The *patent* merely evidences it. It is meaningless to say that a patent relates to the entry, for that is its date. If it is to relate at all, it must go back to an earlier time.

Strange, if the decision in this case be the law, that the distinction between entry and location, as affecting the integrity of a patent and its conclusiveness as to the regularity of all antecedent requirements, was not somewhere announced long ago.

These considerations seem to flow logically from the dangerous notion that a patent may in effect be collaterally attacked by introducing parol evidence to shift the date of its operation from one date to another, as a jury may believe one witness or another.

Justice Field once said of a mineral patent that "its potency was iron-clad against all mere speculative inferences." Had he lived to read the opinion of the Circuit Court of Appeals in this case, he must either have disapproved it or revised his own views upon the subject; for presumptions once supposed to be conclusive are overthrown or disregarded by it, while parol testimony as to their presence or absence may be introduced thereunder without restraint.

It must not be overlooked that the respondent's contention, if sustained and followed by proof to support it (which we do not concede), does more than postpone the effect of the patent to the date of entry. It robs it of its value. For if it can prove

that the discovery was not when stated in the location certificate and confirmed by the patent, it can, if the facts admit, establish its own right to the ores in the claim, without which it is worthless. Of what avail is petitioner's title to the surface if its ores may be appropriated by another? Of what moment is the sanctity of its patent if the thing for which it was granted can be taken with impunity by one who has no patent and merely asserts a tunnel location younger than the lode claim but older than the entry?

Counsel advert to the fact that this court, in the Calhoun-Ajax case, summarily disposed of the error there assigned to the refusal of the trial court to permit the plaintiff in error to prove that at the time of the location of the Ithica tunnel site no ore had been discovered in the mining claims in controversy, and devoted but one or two sentences to it. This circumstance seems to us conclusive. It means that the question was too plain for discussion and had been too often decided to need elaboration. Your honors said:

"The ruling was right. The patents are proof of discovery and related back to *the date of the location of the claims. The patents could not be collaterally attacked.* This has been decided so often that a citation of cases is unnecessary."

Yet the Circuit Court of Appeals has expressly declared that our patents *can* be attacked collaterally, hence we are here appealing for protection. The trial court followed the Ajax case. It obeyed the ruling of this court. The Court of Appeals has overthrown that ruling, reversed our judgment, and ordered the trial court to receive parol testimony to determine whether we have any title whatever, and if so, what the date of it may be. We respectfully submit that no case cited, either in his honor Judge Sanborn's opinion or the counsels' brief, supports the proposition that a patented lode claim *senior in location to alleged rights coming in conflict with the premises included within its boundaries* can be made the subject of parol or collateral attack.

The case of The Rico-Aspen Company *vs.* The Enterprise Company, 167 U. S., 108, does not support the respondent's contention. In that case the "Group" tunnel was located and recorded long prior to the location and discovery of the "Vestal" Lode claim. Besides, the latter did not cross the line of the tunnel location, but was parallel to and five or six hundred feet away from it. The Vestal vein presumably ran with the claim, so that the tunnel never could intersect it. A blind vein cut by the tunnel crossed the Vestal at right angles, and the ownership of that vein within the Vestal boundaries was the point in controversy. The court held that the tunnel, being older than the lode claim, and not even crossing it, was, under the Federal statutes, entitled to the mineral in the vein. It did not intimate that the Vestal patent did not relate back to its location, but merely that the tunnel, being older in location, was older in right as to the blind cross-vein discovered in the tunnel.

It is true that this court there held that the senior tunnel claimant need not adverse a junior lode claim patent application, especially when there was no surface conflict. But if the tunnel be the junior location and the senior lode location directly across its line apply for patent, should not the former, if it believes the latter to be void for want of discovery of a vein therein, prevent its entry by adverse or protest? (See Tioga Mining Co. case, 8 Copp L. O., 88; Bodie Tunnel Co. *vs.* Bechtel Con. N. Y. Co., L. D., 584.)

It will be remembered that subsequent lode locations along a tunnel site are invalid only as to "veins not previously known to exist discovered in such tunnel;" in other words, "veins or lodes not appearing on the surface" (R. S. U. S., sec. 2323). But the answer of the respondent, the rejection of which by the trial court was said to be error, averred that no discovery of mineral in rock in place was made within the lode claims of the plaintiff until after its tunnel site was located. This broad allegation includes veins appearing on the surface as well as those not previously known

to exist, and under the decision of the Court of Appeals enables the respondent to defeat or postpone our patents, provided it can secure proof showing that our discovery of mineral, regardless of its character or previously known existence, was subsequent to the location of its tunnel; and this they aver is not inconsistent with the utterances of this court in Calhoun Co. *vs.* Ajax Co.

And, too, the court will find that the stricken answer alleges that the petitioner's patents were obtained in fraud of the Government for want of such discovery. Virtually, the Court of Appeals upholds such a plea in an action of ejectment; for it would admit proof of the fact from which the fraud must be deduced, if at all. This, indeed, is quite consistent; for, if a patent may be attacked collaterally on one ground, no good reason can be urged against such attack upon any other.

But the contention is made that because the petitioner at the trial offered its certificates of location in evidence, the respondent had the right to rebut its recitals as to discovery. Also that the petitioner thereby "sought to make the location certificate conclusive proof of discovery." Not so. The certificate was offered for one purpose only, and that purpose was to fix the date of location, and therefore the date of the relation about which there is no dispute between us. The same procedure was followed at the trial of the Calhoun-Ajax case, and, indeed, in every case where the relation of a patent became essential. As well might it be contended that because a plaintiff in foreclosure introduces a note to establish its date, the defendant thereby becomes invested with the right to prove that the mortgage in fact took effect only after the suit brought.

Since Mr. Lindley is quoted with approval by counsel, we may be pardoned for referring to his comments concerning the conclusiveness of a patent for mineral lands:

"The final certificate issued by a receiver of the United States land office after the payment of the purchase price

* * * has been repeatedly held to be the equivalent of a patent" (secs. 208, 771).

"A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken" (Lindley, sec. 777, citing Davis *vs.* Weibbold, 139 U. S., 507, and U. S. *vs.* Iron Silver Mining Co., 128 U. S., 673).

"*It is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inauguration of the right; that is to the location upon which the patent proceedings are based*" (Lindley, sec. 783; Heydenfeldt *vs.* Daney Co., 93 U. S., 634; Smelting Co. *vs.* Kemp, 104 U. S., 636; Deffenbach *vs.* Hawke, 115 U. S., 392).

The exception which this author makes to the rule announced is based on the Tyler-Chance case only, and *is limited to controversies where there is no surface conflict* and where the right to veins unite in depth or depart from vertical boundary lines. No such exception as the one here invoked and recognized by the Court of Appeals can be justified either by decision or text-writer.

Without affirming or denying the soundness or otherwise of the quotation made by respondent's counsel from the case of Evans *vs.* Durango Land Company, we may affirm that, if "designated to prevent fraud and injustice," there never was a case calling more loudly than this for its application. The petitioner secured its mining claims in good faith. They were senior in time, and therefore in right. They were superior to the respondent's tunnel site. It applied for patents based on their locations. It gave due notice of such application, as the law required. It made entry and secured Government title. It thus obtained the highest possible evidence of the integrity of its claims and the best possible security against all who would challenge its rights; yet when a trespasser boldly and wrongfully invades its premises, penetrates them with a tunnel, and takes possession of its property, its attempted ejectment is met by the plea that,

although its claims were located before the tunnel, they were entered afterwards. Hence, says the Court of Appeals, the defendants may show that its title was, as against the tunnel, worthless until entry, and therefore worthless altogether. We respectfully submit that the decision we complain of is *in the very teeth of Calhoun Co. vs. Ajax Co.*, is opposed to a long line of kindred decisions of this court, assails the integrity of every patent whose entry succeeded tunnel locations across their boundaries, unsettles titles, threatens vested rights in every mining district of the West, and, by departing from the salutary doctrines of this honorable court, will, if unhindered, bring no end of discord and confusion to many holders of Government mining patents throughout the mining regions.

We respectfully and earnestly ask this court to interpose, not alone for the petitioner's protection, but for the common benefit.

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FILE COPY.

In the Supreme Court of the United States.

October Term, A. D. 1903.

No. 1249.

Filed September 21, 1903
FILED
SEP 21 1903
JAMES H. McKENNEY,
Clerk.

THE CRESEDE & CRIPPLE CREEK MINING AND MILLING COMPANY, Petitioner,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Respondent.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF THE PETITIONER.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 219.

THE CREEDE & CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF THE PETITIONER.

STATEMENT.

On June 19, 1897, the petitioner herein began its action against the respondent herein by filing its complaint in the District Court of El Paso county, Colorado, in ejectment and for equitable relief. On July 6 following the respondent removed the cause to the Circuit Court of the United States for the District of Colorado. On December 22, 1899, it was

transferred to the law side of the docket, and on January 4, 1900, the petitioner filed its complaint in ejectment therein. On February 10, 1900, the respondent filed its answer, and on June 25, 1901, the petitioner attacked a great part of it by motion to strike for irrelevancy, redundancy, immateriality and insufficiency, which motion was sustained on December 6 following. The cause was tried on January 29, 1902, and verdict and judgment given for plaintiff and petitioner. Respondent sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit, by which the judgment was reversed on the 18th day of November, 1902. Thereupon the petitioner applied to this court for a writ of certiorari to the Court of Appeals, which was duly awarded, and the decision of that court is thereby made the subject of review.

The petitioner is the owner in fee of the Little Mary and Ocean Wave lode mining claims in the Cripple Creek district, Teller county, Colorado, which were discovered and located on January 2, 1892. A patent was duly applied for, under which application the claims were entered at the Pueblo land office on August 5, 1893, and patent was afterwards and on December 21, 1893, issued to petitioner upon such entry.

On February 25, 1892, Mason, Hall and Teitja filed for record a location certificate of the Uinta Tunnel claim, fixing the 18th day of February, 1892, in the certificate as the date of its location (exhibit F, page 150, Transcript). The affidavit of Hall appended to the certificate recites that on January 13, 1892, he and his associates located the tunnel site by

posting a notice at its entrance (page 151). This circumstance doubtless caused the respondent to allege January 13, 1893, in its answer, as the date of the tunnel location instead of the date recited in the certificate. The discrepancy, if it be one, is of no practical importance, since the petitioner's lode claims are senior in location to the tunnel site whether the one or the other of the two dates is accepted.

The line of this tunnel is thrown across the Little Mary and Ocean Wave claims, its portal being 550 feet west of the Ocean Wave westerly side line, and 1,175 feet west of the Little Mary east side line. The remainder of its course is wholly to the east of petitioner's premises, but accessible only through them. In August following the tunnel location its owners located a lode claim called the Uinta Tunnel No. 1 claim, using the portal of the tunnel as the point of discovery and extending in a general northerly and southerly direction from it (Transcript, page 154). As this location was not pleaded and does not conflict with the petitioner's claims, the object in offering the certificate of location in evidence is not apparent.

The respondent and its grantors drove the tunnel through and underneath the petitioner's lode claims a distance of 1,175 feet from its portal. They continued it for a further distance of 756 feet, or 1,931 feet from its portal, at which point respondent avers that the tunnel encountered a blind vein not theretofore known and "a cross lode to any lode ever uncovered or discovered in said territory by any person or persons" (Transcript, pages 45, 65). This cross

lode "is at the present time disclosed and uncovered and appears in the breast of said tunnel running almost parallel with its course" (Transcript, pages 46, 66). As the tunnel is alleged to have been driven a total distance of 2,200 feet at the time of the filing of the answer, it appears throughout the last 269 feet of the bore. The pleading does not inform the court when this cross lode was discovered, but exhibit A fixes it on December 18, 1897, although claiming it by relation back to January 13, 1892, as of the date of the tunnel location (Transcript, page 143). The certificate was filed for record March 2, 1898. The location was christened the "Uinta Tunnel No. 23 lode." As its initial point is fixed in the certificate at 1,921 feet from the face of the tunnel, and extends therefrom north 50 degrees 30 minutes, west 300 feet, and south 50 degrees 30 minutes, east 1,200 feet, it does not touch the petitioner's claims, its nearest end being 446 feet to the east of them.

It is averred that when the tunnel reached the distance of 2,102 feet from its portal, or 171 feet beyond its exposure of No. 23 lode, it disclosed and uncovered another vein, also hitherto unknown and undiscovered (Transcript, pages 47, 48, 67, 68). This lode it located by certificate as "Uinta Tunnel No. 24 lode." Its date of discovery is given as December 23, 1897, and the certificate was filed for record on March 2, 1898 (Transcript, exhibit C, page 145). The initial point of the lode is fixed at 2,102 feet from the face of the tunnel, from which point it is extended 750 feet south, 79 degrees east and 750 feet north, 79 degrees west. Its discovery point is therefore within the boundaries of claim No. 23 and much of its ter-

ritory is the same. Its nearest boundary line, however, is 177 feet easterly from petitioner's claims, and so there is no conflict between them.

The tunnel being driven onward intersected a third cross lode 2,118 feet from its face, or 187 feet beyond lode No. 23, and 16 feet beyond lode No. 24. The character of the last vein and its unknown quantity were precisely like its forerunners, and therefore it was located as "Uinta Tunnel No. 25 lode" (Transcript, pages 48, 50, 69, 70). The location certificate dates its discovery on January 6, 1898, and was filed for record March 2, 1898. The initial point of discovery is fixed at 2,118 feet from the face of the tunnel and it extends therefrom 750 feet north, 26 degrees 15 minutes west and 750 feet south, 26 degrees 15 minutes east (Transcript, pages 146, 147). The discovery is therefore within the lines of lodes Nos. 23 and 24, and its exterior lines embrace a considerable part of the premises covered by them. Its nearest boundary line is 193 feet easterly from the petitioner's claims and therefore does not encroach upon them.

Continuing with the tunnel the respondent encountered still another vein at a distance of 2,180 feet from its portal. This vein, similar in all respects as to character and previous knowledge of its existence, was disclosed 249 feet from lode No. 23, 78 feet from lode No. 24 and 62 feet from lode No. 25. It was located and christened "Uinta Tunnel No. 26 lode" (Transcript, pages 50, 51, 71, 72). Although further into the mountain than the others the location certificate recites that it was discovered on December 15, 1897, and the certificate was recorded March 2 following. The initial point is fixed at 2,181 feet from

the tunnel face, from which it extends 1,000 feet north, 11 degrees 45 minutes west and 500 feet south, 11 degrees 45 minutes east (Transcript, pages 48, 49). Its discovery point is therefore within the boundaries of its three forerunners, and its nearest boundary line is not less than six feet to the east of petitioner's claims, hence there is no conflict.

These four veins constitute the sum total of all of respondent's alleged tunnel discoveries. It declares, however, that one Carothers, on January 13, 1897, discovered and located the Black Jasper lode claim, which he afterwards sold and conveyed to the respondent. That "its tunnel enters said Black Jasper lode as aforesaid about 2,250 feet from the mouth or portal thereof and continues along and through said Black Jasper lode to the breast thereof" (Transcript, pages 53, 74).

It is not pretended that the Black Jasper was discovered by the respondent through its tunnel or at all, or that its location or the location of any of its other discovered veins are in any wise in conflict with the petitioner's Little Mary and Ocean Wave lode claims. But it is asserted in the answer that the respondent has the right under the federal laws to enter through and underneath the petitioner's premises and penetrate them with its tunnel, that it may gain access to and develop the claims it located, and that which it purchased lying beyond them. It also claims this right by some undefined species of prescription or estoppel, because it asserts that petitioner permitted it to run its tunnel through the Ocean Wave and Little Mary claims without objection. (Transcript, pages 43, 44, 51, 53.) To empha-

The references to Transcript of Record contained herein are to the original transcript.

size its contentions, it closed its answer with a prayer for relief and asked for judgment

"that it may have the right to use and operate its said tunnel through the said patented Ocean Wave and Little Mary lodes and lode mining claims as said tunnel is now constructed and operated."

"That the defendant has the right to mine and extract ore by it uncovered in said Uinta Tunnel No. 23 lode, Uinta Tunnel No. 24 lode, Uinta Tunnel No. 25 lode, and Uinta Tunnel No. 26 lode, and to haul the same through its said tunnel through, across and along said Ocean Wave and Little Mary lodes and lode mining claims as the same are now penetrated by the said tunnel." (Transcript, page 53.)

In the first division of its answer, being that portion which is directly responsive to the averments of the complaint, the respondent admitted the patent of the petitioner to its mining claims, but alleged that it

"was not obtained or issued in pursuance of the statutes of the United States which provides for the issuance of patents and that such patent is and should be wholly null and void. That said Ocean Wave and Little Mary lode mining claims were not nor were either of them located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered in the discovery shaft of said Ocean Wave lode mining claim, or of said Little Mary lode mining claim." (Transcript, page 40.)

It also denied

"that said patent relates back to or takes effect from the date of said alleged discovery and location for all purposes or for any purpose given or provided by the laws of the United States or of the State of Colorado; but it alleges that there never was at any time or by

any person, any location whatever made of said pretended Ocean Wave lode mining claim or of said Little Mary lode mining claim." (Transcript, page 41.)

These averments, together with all that part of the answer constituting an affirmative defense, were stricken out on motion filed in accordance with the *Code of Practice of the state of Colorado*, leaving the answer with its formal specific denials of the allegations of the complaint. The issues thus presented were met by the petitioner with proof of its patent title and certificates of location fixing the date thereof, which the defendant sought to overthrow by offering proof of the rejected portions of its answer, and these, with the judgment of the trial court and the opinion of his Honor, Judge Sanborn, of the Court of Appeals, make up the record of the case.

In sustaining petitioner's motion to strike out as immaterial and incompetent the bulk of the respondent's answer, the trial court obeyed the principle so many times declared, that a patent of the United States for real estate was the highest evidence of title, and could not be collaterally assailed or impeached. In rejecting testimony offered by the defendant tending to show the absence of a mineral discovery in the Ocean Wave and Little Mary claims, and the alleged discovery of blind veins elsewhere by driving its tunnel forward, the trial court was necessarily guided by its own action in sustaining the motion to strike, together with the law requiring such action; but was especially governed by the decision of this court in the case of The Calhoun Gold Mining Co. vs. Ajax Gold Mining Company, 182 U. S., 499. It was also influenced by the circumstance that the respondent

claimed merely the right of way through the petitioner's patented claims to reach discoveries it had made in other premises, and was not contesting for any vein, lode or ledge discovered or disclosed by the respondent's tunnel within the ground in dispute.

The Circuit Court of Appeals reversed the judgment of the trial court and remanded the cause for further proceedings in harmony with the opinion, upon the ground that because the respondent's tunnel claim was located before the petitioner's mineral claims had been entered for patent, the principles of the Calhoun-Ajax decision were not applicable, and the respondent should have been permitted to assail the integrity of the plaintiff's location by showing an absence of any discovery of a mineral vein in either or both of said claims prior to entry.

Thereupon, petitioner applied to this court for, and was granted, a writ of certiorari to review the decision of the Court of Appeals.

ERRORS ASSIGNED.

In its petition for the writ, the petitioner averred that the Court of Appeals did not follow the ruling and decision of this court, but rendered a judgment and decision in conflict therewith in four particulars, to wit:

"1. The tunnel of the respondent, as in the Calhoun-Ajax case, was not located until after the lode claims through which it was driven had been located, and though both of the lode claims had passed to patent long before this controversy arose, the United States Circuit Court of Appeals held, in violation of

the rule laid down in the Calhoun-Ajax case, that testimony might be introduced to show that at the time the tunnel location was made there had been no discovery of ore within the limits of the two claims, and by such testimony fix the date of the relation of the patents to the two claims not to the date of their location, as announced by this court, but to the date of the subsequent discovery of mineral therein. The trial court having refused to permit such proof to be made, the Court of Appeals has reversed the cause and remanded it to the Circuit Court for a new trial at which such testimony is to be admitted.

"2. That the said Circuit Court of Appeals ran counter to the decision of this court in its construction of Sections 2322 and 2323, Revised Statutes of the United States, in their relation one with the other, by holding in this case that notwithstanding a lode claim had passed to patent, nevertheless, its title was still subject to the right of way of any tunnel which was located prior to the location of the lode claim, or prior to the actual discovery of mineral therein, unless the claim had already been entered for patent in the land office.

"3. That the said Circuit Court of Appeals, in conflict with the rules of law laid down by this court, further held that notwithstanding the absolute grant by the patent of the United States to the claim owner of all veins of every description apexing within his lines, a tunnel claimant was entitled to enter and enjoy certain of them provided his tunnel was located prior to the location of the claim, or prior to the discovery of mineral therein, unless there had been an entry of the same for patent in the land office.

"4. That the Circuit Court of Appeals in this cause held and decided that if at the time of the entry of a lode claim for patent the rights of an adverse tunnel claimant were so uncertain, contingent and intangible as that they could not be fairly litigated he was not bound or concluded by the patent issued upon such entry."

These contentions may be summarized in the general charge that the Circuit Court of Appeals erred in its decision herein by refusing to accept and apply the decisions of this court to the case at bar, and by announcing and applying a doctrine in conflict therewith.

In the opinion His Honor Judge Sanborn emphasized what he considered to be a fundamental distinction between this and the case of the Calhoun Co. vs. Ajax Co., to wit: That in the case last mentioned the tunnel location of the Calhoun Company was junior to the entry of the Ajax Company's lode mining claims, while in the case at bar the respondent's tunnel site, though junior to the petitioner's lode locations, preceded their entry for patent. Upon this distinction alone he formulated his argument and reached his conclusion. But there is another feature of this case, not specially noticed by the court below, which distinguishes it not only from the Ajax case, but from all other cases, so far as we have been able to discover. It is essential, we think, to an intelligent discussion that this distinction should be borne in mind from the outset, since it seems to us to be of much greater importance than any other fact disclosed by the record. It is certainly much more serious than the one relied upon by His Honor Judge Sanborn, which should not have affected the rights of the parties. *We allude to the circumstance that the respondent contends for nothing as against the petitioner except the right of way through its claims.* The blind or cross lodes not appearing at the surface, and which are alleged to have been disclosed by their intersection with this tunnel, are all to the east of the premises of the petitioner.

Respondent has located a claim upon each of said discoveries, the exterior boundaries of every one of which, though conflicting with the others, do not encroach upon the petitioner's territory. It makes no claim to any vein, lode or ledge or the discovery or disclosure by the tunnel of any vein, lode or ledge whatever, blind, cross or otherwise, within the boundary lines of the plaintiff's patented premises, but avers that, because these premises lie between the portal or face of its tunnel and the veins it has discovered, it has a perpetual and everlasting thoroughfare or right of way through petitioner's territory for the convenient working and operation of said veins.

We have already alluded to respondent's alleged purchase of the Black Jasper location from one Carothers, and the intersection of its vertical boundaries by the tunnel about 2,250 feet from its mouth. The respondent also claims this right of way for the operation of its Black Jasper location, whose connection with the tunnel merely consists of the coincidence of its ownership by the respondent. In its printed argument in the court below, respondent said (page 6):

"The patented claims of the defendant in error lie between the portal of the tunnel and the blind lodes Nos. 23, 24, 25 and 26 and the Black Jasper claim, owned by the plaintiff in error and on the line of the bore of the tunnel between the portal of the tunnel and the claims as above enumerated, owned by the plaintiff in error. None of the blind lodes lie within the boundaries of the patented claims belonging to the defendant in error; *there is no controversy here in reference to the right of the defendant in error not only to the lodes on which they made their location and to which they have patent, but there is no claim to any blind lodes lying within the patented areas.*"

We have, then, at the outset an admission by the respondent, first, that there are no lodes in the petitioner's ground upon which its locations were made about which there is any controversy. Also, that the respondent makes no claim either to such lodes or to any lodes within the petitioner's patented areas. The effect, therefore, of the opinion of the Circuit Court of Appeals is that the owner of a tunnel site thrown across previously located mining claims, which are afterwards entered for patent and patented, may attack their integrity, notwithstanding the patent, by showing that no discovery of any vein had been made therein prior to the entry. He may do this, notwithstanding he has made no tunnel discovery within their boundaries for the mere establishment of a right of way through the same.

We respectfully submit that this decision is not only opposed to the doctrine of the Calhoun-Ajax case, but to every decision of this court and of every court in the land where the conclusiveness or validity of a land patent of the United States was involved. Its importance as a precedent, especially when the high character of the court and the great ability of the distinguished jurist pronouncing the opinion are considered, can not be over-estimated. Hence a full analysis of its premises is justified, notwithstanding its erroneous character seems obvious.

Its discussion embraces the propositions: First, the relation of the proofs offered by the respondent to the allegations of its pleadings. Second, the nature and extent of the grant embraced in a patent of the United States for lode mining claims. Third, the effect of Judge Sanborn's decision upon such rights;

and, finally, the conflict of that decision with those previously announced by this court.

I.

THE RELATION OF THE PLEADINGS TO THE PROOFS OFFERED.

In the last paragraph of his decision Judge Sanborn says:

> "The averments that no discoveries of mineral in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant and its evidence to sustain them should have been received."
>
> 119 Fed., 171.

There is no such averment in the answer, either as originally filed or as subsequently reformed through the motion to strike, as mentioned by the court. The answer never contained any general denial. Those which were permitted to remain on file denied by paragraph 4 that the plaintiff ever was the owner in fee of the Ocean Wave and Little Mary claims, but it admits that the plaintiff by some means obtained an alleged patent for said claims (Transcript, page 40). Also paragraph 5, that the said mining claims *were not discovered or located at any time by J. W. Winchell and E. W. M. McNeal, or either of them, or by any person.*

That part of the fourth paragraph of the first division of the answer which was stricken out alleged that the petitioner's patents were not obtained or is-

sued in pursuance of the statutes of the United States providing therefor, and were therefore null and void. Also that the said claims were not, nor were either of them, located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered or uncovered in the discovery shaft on said Ocean Wave or Little Mary claims. That part of the fifth paragraph of the first division of the answer which was stricken out denied that the patent related back or took effect from the date of said alleged discovery for all purposes or for any purposes, and alleged that there never was at any time by any person any location whatever of the pretended Ocean Wave or Little Mary lode mining claims. That part of the affirmative answer, upon the allegations of which an affirmative judgment was prayed by the respondent, makes no reference to the petitioner's location or discovery, but pleads its own title to the tunnel and to the veins discovered therein, together with a right of way through petitioner's mining claims under the federal and state statutes for the operation thereof.

It can not be successfully contended that the denial that the plaintiff was ever the owner in fee of its claims, that it obtained its patent by fraud, that neither of these claims were ever located at any time by any person, and that neither of them was ever located upon discovery vein or veins, or that no mineral vein whatever was ever discovered in either of them, is equivalent to an averment that the plaintiff had never made any discovery of mineral in place within its claims before the location of the tunnel site. The difference between such averments is obvious. Indeed, the averment, which the Court of Appeals as-

sumed to be, but which was not in the record, of a lack of discovery prior to the tunnel location, would have involved an admission of discovery subsequent to such location. The respondent, if its averments were good, would have been at liberty to show no discovery whatever at any time either before or after the patent, which, of course, could not be done even under His Honor Judge Sanborn's opinion.

It is possible that if the answer had contained a general denial of the allegations of the plaintiff's complaint, a liberal construction would have justified the statement quoted from the opinion; but even that, as we have seen, is absent from the answer. As a question of pleading, therefore, and without reference to any other consideration, testimony concerning the want of discovery in the plaintiff's claims was properly rejected.

Reynolds vs. Stockton, 140 U. S., 254.
Munday vs. Vail, 34 N. J. L., 418.
Hicks vs. Mundy, 43 Cal., 522.
Tucker vs. Parks, 7 Colo., 68.
Miller vs. Hallock, 9 Colo., 551.

II.

ESTATE GRANTED BY PATENT FOR LODE MINING CLAIMS.

The character and extent of the estate conveyed by a mineral land patent have been the subject of such frequent judicial construction and comment, that it seems strange that at this day any question affecting

them can arise, or that any more than passing reference to the doctrine were necessary. In the case of Eureka Co. vs. Richmond Co., 4 Sawyer, 302, Mr. Justice Field said:

"A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences."

The same distinguished jurist, in Smelting Co. vs. Kemp, 104 U. S., 646, said:

"A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

In Iron Silver M. Co. vs. Campbell, 17 Colo., 267, the Supreme Court of Colorado, following the decisions of this court, declared that there could be no higher evidence of title than a patent from the United States. In favor of the validity and integrity of such an instrument, it must be presumed that all antecedent steps necessary to its issue were duly taken.

And the rule has been established that a title conveyed by a mining patent relates back to the location which is its foundation as the inception of the right, and cuts off all intervening rights and surface

conflicts not raised and decided adversely to its holder prior to its issuance; a rule forcibly emphasized in the Calhoun-Ajax case.

Heydenfeldt vs. Daney, 93 U. S., 634.

Talbott vs. King, 6 Mont., 76.

Deffenbach vs. Hawke, 115 U. S., 392.

Kahn vs. Old Tel. Co., 2 Utah, 174.

Silver Bow M. Co. vs. Clark, 5 Mont., 318.

Argentine M. Co. vs. Terrible M. Co., 122 U. S., 478.

Deno vs. Griffin, 20 Nev., 249.

Davis vs. Weibbold, 139 U. S., 507.

United States vs. Iron Silver M. Co., 128 U. S., 673.

Montana Central Ry. Co. vs. Migeon, 68 Fed., 811.

Harkrader vs. Carroll, 76 Fed., 474.

Doe vs. Waterloo M. Co., 70 Fed., 455.

Controversies arising in the Ninth Circuit between the owners of lode mining claims having no conflict of surface boundaries and relating to the union or crossing of veins of their respective locations in their downward direction, have induced the Court of Appeals for that circuit to recognize the right of the respective claimants under such circumstances to show by extraneous evidence the date of the actual discovery of the veins in the respective locations. The doctrine as stated by Mr. Lindley, volume 2, section 783, is as follows:

"Where there is no surface conflict, the prior locator would have no standing as an adverse claimant

in patent proceedings instituted by a junior locator. An asserted intersection of veins not involving such conflict is not the subject of the adverse proceeding. In cases of this character, for the purpose of showing the date to which the patent relates, evidence is admissible to prove proceedings under which the title originated. This is not inconsistent with the doctrine as to the conclusiveness of a patent. There is no attempt to impeach that instrument."

The principal cases involving this doctrine are:

Bunker Hills and Sullivan Co. vs. Empire State, 109 Fed., 538, and 114 Fed., 420.

They are founded upon the decision of this court in the case of St. Louis Co. vs. Kemp, 104 U. S., 646, and proceed upon the theory that priority of discovery determines the right to uniting veins below the point of union; that an adverse upon application for patent is only possible where there is a conflict of surface boundaries, and the owner of such a location is not concluded by his adversary's patent, but can, notwithstanding such patent, prove an earlier discovery, notwithstanding the date of his adversary's location, and thereby bring himself within the exceptions expressly recited on the face of the grant. Without discussing or challenging the soundness of this doctrine, it may be stated that the conclusiveness of a patent is not inconsistent with the right of the patentee to show the date of the original proceeding for the acquisition of title, for the purpose of making one of its exceptions operative. The learned justice delivering the opinion in the Kemp case, confines the right to show the period of time in which a

patent may be said to take effect to instances where the date of the original proceeding is not stated in the instrument, and to conflicts of surface locations between junior and senior patents, and with the latter to an initiatory entry. The precise question presented in the Idaho cases has not been determined by this court. By section 2336, Revised Statutes United States, the "prior location" is given the vein below the point of union and the "subsequent location" the right of way through the space of intersection. It would seem from a casual reading of the statute that priority of location would be a conclusive test of ownership under the conditions assumed, but we have stated the doctrine as of interest here only as it seemingly relates to a departure from the salutary principle that seniority of location governs, and that a patent duly issued is conclusive evidence of such location. It does not affect the question under discussion.

The Colorado courts, both state and federal, held for a time that a patent to a lode claim did not embrace what are called cross-veins—that is, veins which on their strike traverse the discovery vein and in whole or in part cross the claim. This doctrine was based upon the supposed conflict between sections 2322 and 2336, Revised Statutes United States, and was the result of an effort to reconcile them. Since the decision by this court in Del Monte M. and M. Co. vs. Last Chance M. and M. Co., and Calhoun Co. vs. Ajax Co., that doctrine has been completely overthrown. In view of the previous decisions of this court in Iron Silver M. Co. vs. Elgin M. Co., and King vs. Amy & Silversmith M. Co., and of the evi-

dent application of section 2336 to veins uniting or intersecting on their dip only, it is somewhat remarkable that such an interpretation was ever applied to the operative clauses of a mineral patent.

In the case of Enterprise M. Co. vs. Rico-Aspen Co., and Campbell vs. Ellett, 167 U. S., 108 and 116, it is held that a tunnel owner discovering a vein in a tunnel has the right to appropriate 1,500 feet in length upon it; that the right rests upon the discovery of the vein, and dates back by relation to the time of the location of the tunnel site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire; and is not destroyed or impaired by the failure of the owner of the tunnel to adverse a previous application for a patent to a lode claim along the tunnel location before the discovery of the vein. This is due to the fact that the time in which the adverse proceedings could be waged had passed, and a present, tangible and certain right and not a mere possibility must exist as the basis of an adverse proceeding. The necessary inference is, that if at the time of the application for patent by the owner of a lode crossed by the tunnel, there is a present certain and tangible right, such right must be protected by the exercise of the right to adverse, and such is Mr. Lindley's conclusion.

2 Lindley on Mines, Sec. 726.

Such, also, would seem to be the reasonable deduction from all of the authorities upon the subject.

Back vs. Sierra Nevada Co., 2 Idaho, 386.

Mining Co. vs. Brown, 11 Mont., 370.

The rule is subject to the additional qualification that a tunnel location must have preceded that of the lode claim which it intersects. These conditions were presented in the cases cited, and, indeed, that must be so or they would of necessity yield to the last declaration of this court upon the subject in the Calhoun-Ajax case, a discussion of which is more appropriate hereafter.

Subject, therefore, to the principle involved in the Idaho and Rico-Aspen cases, neither of which is pertinent to the facts in controversy, we feel safe in asserting that up to the time of the decision of this case by the Circuit Court of Appeals, the rule was fully established and universally recognized that the title conveyed by mining patent relates back to the inauguration of the right, that is to the location upon which the patent proceedings are based, or, as well expressed in Barringer and Adams on Mines, page 417:

"The patent being simply the evidence of the grant, when it has been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights."

To this rule the Court of Appeals announces an exception in favor of tunnel claimants whose location is younger than the entry of a patented lode claim which it intersects. His Honor, Judge Sanborn, invokes the doctrine of the Rico-Aspen case as his support, and seeks to distinguish the Calhoun-Ajax case from the one at bar. We respectfully contend that the first does not sustain his decision, while the last is practically identical with the facts here presented,

apart from the non-discovery of any blind veins within the disputed premises.

III.

THE COURT OF APPEALS' DECISION.

It is difficult to analyze and comment upon this opinion in detail without quoting the whole of it, but to do this might exhaust the patience of the court, and we shall therefore endeavor to state its substance, quoting those portions only which deserve especial attention. His Honor, Judge Sanborn, states the principal question to be:

> "When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site open to determination by means of evidence or testimony *dehors* the patents?"

We have already called attention to two circumstances seriously affecting the existence of the question formulated by the learned judge, the first relating to the condition of the pleadings and the second to the absence within the premises of the petitioner of any vein discovered by the respondent. Had the last point been given due weight it is doubtful whether any opinion would have been rendered at all upon the proposition announced by the court.

His Honor recognizes the impossibility of attacking a land patent in an action at law, and asserts that

if the opinion of this court in the Calhoun-Ajax case is carelessly read without knowledge of or reference to the question there considered, it might seem to be broader than it really is, but that its careful examination does not support the view contended for by the petitioner. His Honor then announces what he terms "radical and controlling differences between the question presented in that case and the issue of law before us." These differences are numbered 1, 2 and 3 respectively in the opinion. The first is that the judgment of the land department allowing the entry of the petitioner was between the petitioner and the United States only, and thereby binding upon them and their subsequent assignees; that the respondent was not, and was not required to be, a party to that proceeding and therefore not bound by the action of the department in allowing the entry and issuing patents. Its rights then were too "uncertain, contingent and intangible" for determination.

"When the applications for the patents of the lode claims were filed, the blind veins which have induced the use of the tunnel through the lands in controversy had not been discovered, the tunnel had not been driven into the land, and it was impossible to know whether or not the claimant of the tunnel site would ever acquire any right to use the land for the purpose to which it is now devoted."

The facts recited in the above quotation from the learned judge's opinion are not altogether warranted by the record. It contains no recital justifying the statement that when the petitioner's applications for patent were made the tunnel had not been driven into the ground. For aught that appears to

the contrary, it may at the time of such applications have been extended entirely across petitioner's premises. The answer alleges that the tunnel entered the petitioner's westerly side line more than a year prior to the commencement of the action. This allegation is entirely consistent with the conclusion that it was driven at or before the application for the patent.

But if the respondent was exempt from the duty of adversing petitioner's application for patent because these rights are assumed at that time to have been "uncertain, contingent and intangible," we venture to inquire in what respect they have changed so far as the petitioner's premises are concerned since that time. It has absolutely no claim to anything in the petitioner's ground. It has admitted in its argument before the Court of Appeals that *it has no right to the lodes upon which the petitioner's claims were located*, and that it has discovered no veins therein. If these rights were then "uncertain, contingent and intangible," have not the subsequent developments demonstrated the existence of no rights whatever, contingent or otherwise? Respondent has, contrary to the petitioner's will and against its consent, explored the petitioner's premises for the entire length of its tunnel through them. It has found nothing. Its "intangible rights," whatever they may be, have been demonstrated to be non-existent in law or in fact. Can it, therefore, have any standing in a court of law or equity which can justify its attempted attack on petitioner's patent, either directly or indirectly, except on the hypothesis that, having trespassed on and found no vein within our territory, it may use its tunnel for exploration elsewhere?

Let us assume that the respondent, after crossing petitioner's territory and before intersecting a vein elsewhere, had been proceeded against in ejectment. Would its right have been any more certain and tangible then than it was at the time of the patent application, and can it be that it was relieved from the necessity of adversing our patent application because these rights were nebulous and contingent, but can now assail our title and the period of our discovery when its so-called right is no longer intangible and contingent, but has been demonstrated by development to have been without foundation *ab initio?*

We can understand how a senior tunnel location which has not penetrated a junior lode location can lose nothing by failure to adverse the latter's application for patent and then assert a right against it growing out of the discovery by the tunnel of a blind vein within the premises of the patented junior location. We can not perceive, however, any right of the tunnel claimant even under such conditions to attack the patentee after demonstrating by the exploration of its tunnel that no blind vein whatever exists within the vertical boundaries of the patented premises, but the Circuit Court of Appeals under far less favorable circumstances has determined that *a junior tunnel location entirely barren in its course across intervening patented claims senior to the time of its location may assail the integrity of the patent by denying its location upon the discovery of any mineral vein prior to the date of its entry.*

The second distinction asserted by His Honor between this and the Calhoun-Ajax case is that in the latter case the discoveries in the lode claims were nec-

essarily considered and adjudged by the land department to have been made before the location of the tunnel site, and that such finding was indispensable to the decision that the lode claimants were entitled to make the entries, as the location of the tunnel site was subsequent to the entries, and hence the finding that the discoveries were made before the entries was necessarily a finding that they were made before the location of the tunnel site, and was binding, therefore, upon the claimant of the tunnel site. This His Honor says is not true in the present case. "The question here is whether or not discoveries were made in the lode claims prior to January 13, 1892, the date of the location of the claim to the tunnel site. The determination of this question was neither indispensable nor material to the adjudication made by the land department on August 5, 1892, that the lode claimants were entitled to enter the land, and there is nothing to show that this issue was ever considered or decided by the department in reaching its conclusion. The only question relative to the discoveries that it was required to determine was whether or not they had been made prior to *August 5, 1892*, when the entries were permitted, and the decision of that question left entirely untouched the issue in this case, whether they were made before or after the location of the tunnel site on January 13, 1892."

The entry, as a matter of fact, was made on the 5th day of August, 1893 (Transcript, page 138). This discrepancy, however, is not controlling, and may be an error of the reporter. The important feature of the so-called distinction of the Court of Appeals is that in the Ajax case it is solemnly declared that a finding

by the department that discoveries had been made before the date of the entries of the lode claims was indispensable to the decision that the lode claims were entitled to make such entries. If such a decision was indispensable to such a view in that case, such a decision was equally indispensable to such a view in this case. In each instance the finding must have been that the discovery preceded the entry, and in each instance the decision is binding as to all the world. If the tunnel claimant in that case could not go behind the entry, how can the tunnel claimant in this case go behind it, except it be determined that a decision admitting the entry was indispensable there and of no consequence here? It is no answer to this query to say that the respondent was limited in his proof of non-discovery to the time between the two locations. It has contended for no such limitation, and there is nothing in the logic of the court's decision to warrant it. The necessary consequence of the doctrine is that in the case at bar the respondent may roam over the entire period between the location of our claims and their entry for the purpose of showing no discovery. If that can be done, we see no reason why the entry should be given any significance whatever; for, if it be true, as stated by Judge Sanborn's first contention, that the judgment of the land office in permitting the entry and patent is not binding upon the respondent, which was not and was not required to be a party to that proceeding, it must follow that the respondent can, notwithstanding such judgment, show, if the fact be so, that there never was any discovery of a mineral vein in either of the petitioner's claims between the date of their location and the commencement of

the suit. For if such a judgment does not bind respondent, which was not a party to it, its freedom from the judgment is as perfect after the entry as before it.

His Honor's third distinction between the two cases is:

"That when the entries were made in the Ajax Gold Min. Co.'s case no claim to a tunnel site had been located or staked upon or across the lode claims; and the entries of them, and the patents to them vested the title in the claimants free from any right or claim to a tunnel site. It is otherwise in the case at bar. The claim to the tunnel site was located and staked out across these lode claims before they were entered. Under the revised statutes and the law the entries and patents of these claims vested the title to them subject to the right of an owner of an adjoining lode claim to follow on its dip through a side line and through the patented territory of these lode claimants any vein which has its apex in his claim. While, therefore, it is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests, it is no such attack to assert the rights of the claimant of a tunnel site located before the entry of the land against the patent of it to a lode claimant, because under the statutes and the law such a patent always issues subject to those rights."

We deny both the premises and the conclusion involved in this statement. If they embraced a correct exposition of the law, section 2322 of the Revised Statutes of the United States has been construed in vain for the past thirty years. The patent can not be contracted beyond the exceptions expressly contained within its recitals. Our patent gives us, both under the provisions of that section and the decisions of this

court, the particular vein patented, and all other veins the tops or apices of which are included within the exterior boundaries of our location. The right of an adjoining owner to follow his vein on the dip through the side line grows out of the patent to that claim and of the location of the apex of the vein within it, and rests upon the exception expressly inserted in all lode claim patents. The tunnel claimant, on the other hand, asserts the right, notwithstanding our preceding location, to every vein apexing within our claim and not appearing at the surface which his tunnel may encounter, notwithstanding the seniority of our location; and in spite of the patent is is conceded the right by the Court of Appeals to attack its validity up to the very hour of the entry thereof. Every argument upon which this remarkable proposition is based, if sound, justifies its right to attack our patent down to the hour of trial and irrespective of the entry. The latter either binds the respondent or it does not. If it is binding, then the entry takes effect by relation back to the date of location. If it is not binding for the reasons given by His Honor Judge Sanborn, it may be swept aside whenever the interests of the respondent may require it.

His Honor, again misquoting the averments of the respondent, "that no discoveries were made in the lode claims until after the location of its claim to the tunnel site," argues that "if this allegation is true, it may be doubted whether the lode claims can be said to have been initiated before the claim to the tunnel site was located," and then cites a number of authorities in support of the proposition that there can be no location of a mining claim until the discovery of a vein

within its limits. The "allegation" can not be true, because the averment does not appear in the pleadings, but if it were made, and if it were true, a patent having issued for the premises, relieves the location of all vulnerability whether it was located upon a vein discovered previous to location or not, and the argument of the Circuit Court of Appeals again fails.

His Honor assures us that if this litigation had arisen prior to entry the question of discovery would be decisive, and then asks what there is in the entries and patents to deprive the defendant of the right to try this issue now upon like evidence? We answer the patent itself, and the date of our location as compared with that of the respondent's tunnel site, which by the patent is conclusively established as the date of discovery. If there is nothing "in the entries and the patents to deprive the defendant of its right to try these issues now upon like evidence," it must follow that the entries and patents are of no consequence and the defendant ought not to be confined in his proof to the date of his entry. If the Court of Appeals' decision be sound, and the petitioner's claims were eleven years instead of eleven days older than respondent's tunnel site, during all of which time it had been in possession, and after the expiration of which time we had made our application and entry, the claims would still be subject to respondent's assaults. Such a doctrine is repugnant, not only to the sense of justice, but every decision of this court pertinent to the subject.

THE CALHOUN-AJAX DECISION.

The decision of this court in the case of The Calhoun G. M. Co. vs. The Ajax G. M. Co., 182 U. S., 498, is conclusive of every question in this case. The trial of the case at bar was intentionally postponed by the petitioner until that decision was announced. It arose between litigants owning property in the same mining district, and its importance was appreciated not only as affecting this but many other controversies then pending or threatened throughout the state of Colorado. The Circuit Court conducted the trial in strict conformity with its principles, and the distinction drawn by the Court of Appeals between the two cases may have been imagined, but was not presented to the consideration of the trial judge. A comparison of Mr. Justice McKenna's opinion with that of His Honor, Judge Sanborn, will fully justify the charge of their hopeless conflict and the consequent violation of the former by the latter. The facts constituting the Calhoun-Ajax controversy and appearing on pages 502 and 503 of the report, are identical with those now before us, except that the blind or cross veins there contended for were within the boundaries of the lode locations crossed by the tunnel, and except also that the tunnel location was there made after the entry of the claims and before their patent, while here it was made after the lode locations and before their entry. The first distinction is important in that nothing is or can be claimed by respondent here against petitioner except the right of way through its premises. The second distinction is one, we submit, that is wholly without foundation in

law. It was not alluded to in the opinion of this court, nor is the latter limited, either by expression or construction, to conditions peculiar to the case itself.

In the Ajax case four propositions were considered. The third is unimportant here. The others are, first:

"First. Whether the entry of a tunnel claimed by plaintiff in error is entitled to a right of way through the defendant in error's lode claims. Second. Whether or not plaintiff in error has acquired by virtue of such tunnel site location and ownership a right to the possesion of blind lodes cut therein, to wit: veins or lodes not appearing at the surface and not known to exist prior to the date of the location of said tunnel site. Lastly. Whether or not plaintiff in error should have been allowed to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl lode claims prior to the location of said tunnel site."

The two questions to be here determined are practically identical to those numbered one and four in the Calhoun-Ajax case. They may be stated as follows:

First. If a lode claim has been patented under section 2322, does section 2323 modify the preceding section and give claimants of tunnel sites located subsequent to the location of the lode claim a right of way through such lode claim for any purpose?

Second. To what date does the patent to such a lode claim relate; to the date of such location, or can the tunnel claimant fix the same by parol testimony without reference to such patent?

This court in the Calhoun-Ajax case, page 507, says that the assignments of error mentioned relate to rights

"claimed by the plaintiff in error by the location of a tunnel site and presented the question whether such location gave to the plaintiff in error the following rights: A right of way through the lode claims of the defendant in error, and the possession of the blind veins cut by the tunnel underneath the claims of the defendant in error.

"Plaintiff in error asserts a right of way for his tunnel under Section 2323 by implication, and from that implication and the rule it contends for as to cross veins, deduces its right to all of the blind veins. The contention as to cross veins we have answered, *and the deduction as to blind veins is not justified.* The section contemplates that tunnels may be run for the development of veins or lodes; for the discovery of mines; gives the right of possession of such veins or lodes, if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. *There is no implication of a displacement of surface locations made before the commencement of the tunnel. Indeed, there is a necessary implication of their preservation, and there can be no implication of a conflict with the rights given by Section 2322. The exclusiveness of those rights we have declared. A tunnel can only be run in subordination to them. How else can Section 2322 be given effect? There are no exceptions to its language.* **The locators 'of any mineral vein, lode or ledge' are given not only 'an exclusive right of possession and enjoyment' of all the surface included within the lines of their locations, but 'of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' A locator, therefore, is not confined to the vein upon which he based his location and upon which the dis-**

covery was made. 'All veins or lodes having their apices within the planes of the surface lines extended downward are his, and the possession of the surface is possession of all such veins or lodes within the prescribed limitations.'"

The court, quoting from Campbell vs. Ellet and Del Monte Co. vs. Last Chance Co., continues:

"The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defendant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on the statutes of Colorado, it is disposed of by their interpretation by the Supreme Court of Colorado."

The last proposition was briefly and tersely disposed of by the court:

"An assignment of error is based upon an offer of plaintiff in error to prove, that at the time of the location of the Ithaca Tunnel site, no ore had been discovered in two of the patented claims of the defendant in error, to wit: the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the location of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

We find here no strained inferences or the use of any language justifying the establishment of a distinction between cases where tunnel sites were located after lode mining claims and those where tunnel sites were located after the mining claims were entered. It is not here said that the patents were proof of discovery and related back to the date of entry, but to the date of locations. Nor is it inti-

mated that some patents have such relation and that others have not. Yet the Court of Appeals has said, notwithstanding this decision, that the petitioner's patents do not relate back to the date of the location, but to some time or any time to be fixed by parol testimony prior to the date of entry, and that the respondent has a right of way through the petitioner's property notwithstanding his patents, merely because it located its tunnel before we entered our claims. As illustrating the uncertainty involved in that decision, we may be pardoned for asking whether proof as to the discovery of mineral would be admissible against petitioner up to the very day or the very hour before the entry was made. If the right exists, what infinitesimal period of time could be fixed by the court preceding the entry within which a patent is invulnerable and prior to which it is subject to attack. If it is true that a patent when granted relates back to the date of location, no attack can be made upon the title of the claim between that date and the date of entry without involving an attack upon the patent. If it relates back only to the date of entry, then the patent only grants a fee apparently indisputable to that date. But prior to that date the location covered by it is as open to assault as though no patent had been issued for it, and if the assault is successful the patent is as completely overturned as though it related to a time subsequent to the entry. Such a rule would mean that the government only grants a fee in form which may be absolutely worthless by reason of the existence of tunnel claims located across it fifteen minutes or fifteen months before its entry. The government gives us a patent to mineral lands because of our compliance with its laws. Its officers, in grant-

ing a patent, pass upon the application which is only conclusive from the date of the entry, although it is assumed to be conclusive from the date of the location. It is subject to attack from parties like the respondent up to the date of the entry, notwithstanding the patent, and yet we are gravely assured that this does not involve a collateral attack upon the patent. If this be the law the respondents might have made a lawful tunnel location across the petitioner's mining claims after its posting and publication of notice of application had expired, after every step required in the securing of patent save making the entry had been complied with, and after the government itself, under its own regulations, could not refuse the grant.

It is true, as the Circuit Court of Appeals suggests, that a location certificate of a mining claim is not conclusive proof of the facts which it recites against those asserting rights adversely to its maker, but the rule is applicable only to claims which are unpatented. It is equally true that when a patent is legally and regularly obtained upon and under such location certificate by compliance with all of the requirements of the federal law and the department regulations, it relates back to such location and then takes effect whereby the recitals of such location certificate are practically made conclusive. We recall no expression of this or any other court to the contrary.

The only possible theory of the Calhoun-Ajax case that harmonizes with the decision here is to assume that by the former it was determined that a patent when issued takes effect only from the date of entry instead of the date of location; but this would

be to decide that there was no relation whatever, since the entry is virtually the patent itself. *To say that the actual time of discovery instead of the date of the location is the time at which the patent takes effect is to say that by parol proof it might be made to take effect subsequent to its date, for the evidence might so determine. On the other hand, such evidence might show that no discovery was ever made. In that event, would it be said that the government title was of no effect whatever?*

His Honor, Judge Sanborn, says: "It is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests," but that "it is no such attack to assert the rights of the claimant of a tunnel site located before the entry, because, under the statutes and the law, such a patent always issues subject to those rights." We have heretofore challenged the soundnes of this statement. If it be true, a tunnel claimant may make a location of his tunnel within an hour prior to the lode entry and thereby make an attack upon it that is not flagrant but lawful. If he delays two hours and then attacks, his action is flagrant. Is it not clear that by this decision the doctrine of relation is not modified, but destroyed? The entry is the title. The patent merely evidences it. It is meaningless to say a patent relates to the entry, for that is its date. If it is to relate at all, it must go back to an earlier time. His Honor concedes this, but nevertheless declares it open to attack under certain conditions at any time prior to entry. It seems remarkable that if this decision is the law, the distinction between entry and location, as affecting the integrity of a patent and its conclu-

siveness or otherwise as to the regularity of all antecedent requirements, was not announced long ago.

It must not be overlooked that the respondent's contention, if sustained and followed by proof to support it, which we do not concede, does more than postpone the effect of the patent to the date of entry. It might rob it of all its value; for, if the respondent can prove that the discovery was not as stated in the location certificate and confirmed by the patent, it can, if the facts should warrant, establish its own right to the ores in the claim. Of what avail are the provisions of section 2322 against which "no implications can be made, of what value is petitioner's title to the surface, if its ores may be appropriated by another? Of what moment is the sanctity of its patent if the thing for which it was granted can be taken with impunity by one who has no patent and merely asserts a tunnel location younger than the lode claim but older than the entry?

The case of the Rico-Aspen Co. vs. Enterprise M. Co., heretofore referred to, does not support the respondent's contention. The group tunnel was there located and recorded long prior to the location and discovery of the Vestal lode claim. Besides, *the latter did not cross the line of the tunnel location, but was parallel to and five or six hundred feet away from it.* The Vestal vein presumably ran with the claim, so that the tunnel never could intersect it. A blind vein cut by the tunnel crossed the Vestal at right angles, and the ownership of that vein within the Vestal boundaries was the point in controversy. The court held that the tunnel, being older than the lode claim, and not even crossing it, was, under the federal statutes, entitled to the mineral in the blind vein. It did not

intimate that the Vestal patent did not relate back to its location, but merely that the tunnel, being older in date, was older in right to the blind cross-vein discovered in the tunnel. It is true that this court there held that the senior tunnel claimant need not adverse a junior lode claim patent application, especially where there was no surface conflict; but if the tunnel be the junior location and the senior lode location directly across its line apply for patent, should not the former, if it believes the latter to be void for want of discovery of a vein therein, prevent its entry by adverse or protest? (See Tioga M. Co., 8 Copp L. D., 88; Bodie Tunnel Co. vs. Bechtel Con. N. Y. Co., 1 L. D., 584.)

It will be recalled that subsequent lode locations along a tunnel site are invalid only as to veins "not previously known to exist discovered in such tunnel;" in other words, "veins or lodes not appearing on the surface." (R. S., U. S., 2323.) Nevertheless this recital necessarily involves, as was said by this court, the recognition of such locations as were made previous to the location of the tunnel, not only as to those apexing at the surface, but as to all other veins, lodes or ledges existing therein.

The effect of the Court of Appeals' decision, apart from its conflict with that in the Ajax case, will, if sustained, be far-reaching. Of course, if it is correct, its consequences will not deter this court from affirming it. On the other hand, such consequences may become important should any doubt exist as to its correctness. It will expose the validity of every patent to attack by every tunnel location across their boundaries prior to entry, thereby unsettling titles, threatening vested rights in every mining district in the West, and

by departing from the salutary doctrines of this Honorable Court will bring disquiet and contention to many holders of mining patents throughout the mining regions.

We respectfully submit that the opinion of this court in the Ajax case settles the petitioner's right to its premises, concludes the position of the respondent as to a right of way across the petitioner's premises, and forever estops it from assailing either petitioner's patent or the date upon which it took effect. That the decision of the Court of Appeals is in conflict with such decision, finds no support either in the statutes or any of the opinions of this court, introduces a vicious principle into the law of patents, unsettles titles, exposes their holders to needless and expensive litigation, and their land to constant entry and occupation by so-called tunnel claimants; offers a premium for the location of bogus tunnel claims, provokes litigation, and above all unsettles and confounds titles held by citizens under the laws of the United States. We ask that the decision of the Court of Appeals be reversed, and the judgment of the trial court affirmed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 219.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, RESPONDENT.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

The important corrections deemed essential by counsel to be made to our original statement of the case are not apparent from their copious references to the record. Nothing that we have recited from it is successfully challenged. Our references to it have been assailed, and, following their usual custom, counsel have accused us of perverting facts in framing our assignments of error, but in no instance have their charges found support.

It is wise to avoid a bad example. But for this we might retort with perfect propriety that counsel's statement of the

facts is subject to all the criticisms leveled at our own. It is sufficient, however, to say that some of the things they attribute to the record belong rather to counsel's misunderstanding of the facts and to an eleventh-hour preparation of their brief, when time, being more precious than accuracy, gave scant opportunity for careful study.

Thus, on page 2, it is said that the respondent defended upon the grounds that petitioner and its predecessors had allowed the respondent under a claim of right, &c., to expend over one hundred and twenty-five thousand ($125,000) dollars in the mining of its tunnel, and had, in fact, consented and acquiesced therein, until after the expenditures had been made, and until after the discoveries of the blind lodes had been made by the respondent through the extension of its tunnel, &c.

This action was brought in the State district court of El Paso county on June 15, 1897 (Transcript, p. 1). It was removed to the circuit court of the United States on July 16, 1897 (Transcript, p. 15). The respondent filed two answers, on September 19, 1898 (Transcript, p. 33), and February 10, 1900 (Transcript, p. 50), respectively. In both these answers the discoveries of the "blind lodes" are alleged to have been made long after the suit was brought, and the location certificates thereof recite the dates of their discoveries as December 18, 1897; December 23, 1897; January 6, 1898, and December 15, 1897, respectively (Transcript, pp. 132, 134, 136, and 137). How, then, could petitioner have acquiesced in the prosecution of work on the tunnel until these alleged lodes were discovered?

Again counsel say (page 6) that it is claimed by the respondent and expressly pleaded in its answer that the alleged discoveries claimed to have been made on the Little Mary and Ocean Wave Lode claims, and which constituted the origin and basis of all title thereto, were not in fact made until long after the location of the Uinta Tunnel site, &c.

The only reference to this subject to be found in the pleadings occurs in the 21st paragraph of the affirmative answer. The respondent there avers that petitioner's patent was issued subject to the acts of Congress concerning tunnel rights, and to the laws of Colorado concerning the right to run tunnels through patented ground, for the purpose of reaching territory belonging to tunnel-owners beyond it, and subject to respondent's rights to any and all "lodes, veins and mining claims it might cut or discover in driving the tunnel; that the pretended discovery of petitioner alleged and pretended to have been made in and upon said pretended lodes was not made until long after the location of the Uinta tunnel, and at the time said pretended locations were made, the locators thereof were advised and knew that the tunnel had been located, and was being prosecuted with due diligence, and that the Ocean Wave and Little Mary Lode mining claims, so far as the same may now be claimed and possessed by the said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with section 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims, and to drive drifts therein, and to follow said lode claims as located by this defendant, and to reach lode claims so owned by this defendant as heretofore and hereinafter stated."

An allegation that the plaintiff pretended to make a pretended discovery in pretended claims after defendant's location refers necessarily to the date of the pretense—not to the date of the discovery. The making of the latter at any time was denied elsewhere. A pretended discovery is no discovery; and if it be true that none other than a pretended discovery was made by petitioner's grantors, then the date of the pretense is unimportant.

But, counsel continue: "It being pleaded by the defendant that its tunnel-site location was made prior to the lode location, it being denied in the answer that the lode loca-

tions were made prior to the tunnel-site location, in determining the materiality and sufficiency of these allegations, it must be taken as true as a matter of fact that the tunnel-site location was prior in date of location, and superior in matter of right to the date of location and the rights of the lode mining claims." Why? Is the denial of this defendant, assuming it to have been made as stated, so potent that it must stand as against all other assertions? It is of course true that a plaintiff must prove in the first instance all controverted allegations of material fact at the peril of a nonsuit. But this has to do with the burden of proof, not with the superior quality of the defendant's assertion.

But the statement is that of counsel. It is not that of the record. We have heretofore adverted to the fact that there is in this case no general denial. Not only so, there is no denial whatever of the date of the petitioner's locations. On the other hand, the respondent in its affirmative answer alleges the date of its own location as January 13, 1892, or eleven days thereafter. These things appearing, any allegation to the effect that the younger location was in fact the elder would be absurd.

We plead guilty to the charge that we have constantly asserted that our lode claims were first located and that the fact was overlooked by the circuit court of appeals, and we deny that "the reverse is true." It appears from the pleadings, from the petitioner's testimony, and from that offered by the respondent and excluded by the trial court. It is this fact which undermines the reasoning of his honor Judge Sanborn and should prove the undoing of the respondent here. We are in truth forty-seven days and admittedly eleven days senior in time to the Uinta Tunnel location, and that is sufficient.

We are accused of treating the decision of the circuit court of appeals discourteously, and of casting aspersions upon it. This gratuitous assertion is wholly without excuse. It was doubtless inspired by the conviction that no other answer

could be made to our contention of its inconsistency with the Calhoun-Ajax case, but that does not justify its utterance. The respect we entertain for that court and the judges composing it, our personal regard for his honor Judge Sanborn, as well as for the requirements of professional duty, prompt us to repel this imputation. Surely we seek to reverse the judgment of the circuit court of appeals because it is not in harmony with the doctrines of this court or the laws of the United States. We know of no other way in which it can be done, and respondent's counsel are welcome, so far as we are concerned, to a monopoly of personal innuendo.

Coming now to the substance of respondent's argument, it is well to determine what was the nature of the issues it sought to frame by the answer to petitioner's complaint, and why the motion to strike certain of its averments from the record was sustained. It will be seen (Transcript, p. 37) that after admitting the corporate character of the parties and the amount involved in the controversy it denied that plaintiff had been the owner in fee of the Ocean Wave and Little Mary claims, or entitled to their possession. It also denied that the claims were ever discovered or located, or that it ever ousted the plaintiff from their possession or any part thereof. By our code, ouster need not be proven by plaintiff if the defendant files any other answer than a disclaimer. It also attempted to deny the validity of petitioner's patent, declared it to be null and void, and that no discovery of a mineral vein was ever made in them, or that the patent had any relation to any discovery, or that the claims were ever located. It further alleged that plaintiff for more than a year before the commencement of the action knew that the defendant was driving the tunnel through its premises, and that said work was done with the knowledge and consent of the plaintiff. These averments were stricken out because the former assailed the patent and the latter was lacking in nearly all the essential requirements of an estoppel, for which purpose alone it could be material.

The fourteen succeeding paragraphs (Transcript, pp. 38–50) were intended as an affirmative answer and "further defense" to the complaint, in which the location of the tunnel site, its extension, the discovery of several so-called blind lodes beyond the ground in controversy long after the commencement of this action, the acquiescence of the plaintiff in the extension of the tunnel through its ground, the location of the Black Jasper lode across the tunnel by an outsider and its purchase by the defendant, its right to use the tunnel for the development of that claim, its right to cross veins in other claims, are all thrown together. Under the Colorado practice such a condition is not the subject of demurrer, but must be met by motion. Hence plaintiff's demurrer was withdrawn and the motion substituted, which was by the court sustained.

Under our code a defendant may plead as many defenses as he may desire, even though inconsistent, but each must be complete in itself. He cannot confuse seniorities of location, estoppel, the right to use the tunnel for the development of claims by others on the surface, rights created by State statutes, and failure of plaintiff to comply with statutory requirements, all in one answer, and then separate and classify its component parts at the trial. Mr. Pomeroy properly says that in such a case "each defense must be complete in itself, in its material allegations or its denials, to constitute an answer to the cause or causes of action against which it is directed * * * Each must in its composition be complete, sufficient, and full; it must stand upon its own allegations" (Pomeroy on Code Remedies, sec. 716).

Such, indeed, is the express requirement of the Colorado Code.

Independently, therefore, of every other principle than that presented by the pleadings, the defenses were properly stricken out, and being stricken out evidence to support them was properly excluded. The respondent might have reformed its pleadings, and separately stated its several de-

fenses, but it preferred to stand by the answer as framed. It cannot now complain of the exclusion of its offered testimony, its plea having been properly rejected on plaintiff's motion.

But counsel complain that having alleged a discovery of the Ocean Wave and Little Mary claims, we should have been required to prove it. If our proof failed in this point the defendant would have asked for a nonsuit. But it did nothing of the kind. It was content to object that the location certificates offered were inadmissible because no proof of discovery had been made, and the plaintiff, then resting, proceeded with its own offers of testimony.

The claims having been patented, discovery was conclusively presumed and the certificates fixed the date thereof. Their introduction was for that purpose and subserved it. "Patent titles when granted relate to the first initial valid step which is the foundation of the right and in pursuance of which the patent is granted" (Stark *vs.* Starrs, 6 Wallace, 402; Yount *vs.* Howell, 14 Cal., 465; Ely *vs.* Frisbie, 17 Cal., 250). Numerous cases to the same effect might be cited. As the location is the first step in the acquisition of mineral lands and the foundation of the title thereto, the respondents, following the allegation in their answer, put these location notices in evidence. They are not set out in the record, but as chains of conveyances down to the patentees and respondents were put in evidence, it may be assumed that the respondents were not the locators, and if not, then the connection between the patent and the location notice was not complete, even for the purposes of relation, until these connecting evidences were put in. Without them the respondents would have patent title, but it would not appear that that title was connected with the location notices. For the purposes for which this evidence was offered, it was clearly admissible and material (Kahn *vs.* Mining Company, 2 Utah, 188; United States *vs.* Iron Silver

Mining Co., 128 U. S., 673; Justice Mining Co.; see 21 Col., 260; 2 Lindley on Mines, sec. 783).

The certificates of location constitute the basis of petitioner's application for patent. Upon them the official survey was made, the patent applied for, the entry accepted, the certificate of purchase issued, and the patent executed and delivered. It recites upon its face the date of discovery. It would be singular if in the face of all these things petitioner should be required to do anything more than introduce them or the respondent be permitted in a collateral proceeding to attack them. If the Government were itself to institute proceedings for the annulment of our patent for want of discovery, the location certificate with its recitals would be taken as the inception of our title and its direct attack would begin with it.

But counsel say such proof is not conclusive, and error was committed in not permitting respondent to contest it. The sole ground of this contention must be found in the fact that its tunnel was located before the lode claims were entered for patent. This is conclusive of discovery, but they say it is not conclusive on the point of time. Our original brief has been written to no purpose if we have failed to demonstrate that the patent relates to the location and screens the latter from all collateral attack by the owners of tunnel locations of younger date.

It is insisted that the 21st paragraph of the answer sustains his honor Judge Sanborn's reference to an allegation of no discovery prior to the Uinta location. We have hitherto referred to this paragraph, and to what it does allege, as well as to the fact that it is made part of a general affirmative answer, which, properly divided and pleaded, might possibly present a number of distinct defenses. We merely add that a pretended discovery of a pretended lode, pretended to have been made at a pretended time, after pretended locations, does not involve an admission of any discovery whatever. To pretend is to feign or sham; to hold

out or represent falsely. And so the answer, both in its affirmative and negative parts, denies any discovery whatever. But were it otherwise it could not affect either the petitioner's right to all that its patent and location gives it under the law, or the respondent's ability to attack them.

But the respondent relies practically for its defense upon its construction of the Rico-Aspen case, 167 U. S., 104, and which it contends not only absolved it from the necessity of adversing the plaintiff's application for patent, but recognizes its right to attack the patent when its interests should demand. In that case, as before stated, the Group tunnel was senior by eight or nine months to the Vestal location, and the latter not only did not intersect the line of the tunnel, but was parallel to it some hundreds of feet away. The decision establishes the relation of a senior tunnel location to a junior lode location within a radius of 1,500 feet on either side, and declares the former not obliged to adverse the latter's application for patent when its rights are at the time uncertain, contingent, or intangible.

The converse of this proposition should be equally true. If at the time of the patent application for the lode the tunnel right had become tangible, certain, or positive, it should be asserted by an adverse, or it is lost. If at that time the exploitation has been complete and no blind vein has been encountered and its absence has been fully demonstrated, there is nothing in the ground to which the tunnel-owner can lay claim, and the grant of the patent to the premises included within the location is absolute. Surely, if the tunnel-owner is absolved from the duty of adversing the lode application because his interest is too remote and shadowy for identification, the transformation of that condition into a certainty either for or against its existence creates the duty and makes its observance imperative. (See Back *vs.* Sierra Nevada Co. (Idaho), 17 Pac., 83.)

Counsel for the plaintiff in error in the Calhoun-Ajax case were as insistently reliant as are counsel here upon the

doctrine of the Rico-Aspen Enterprise case in support of their claims for the tunnel. Their arguments, too, were quite as well grounded and apposite as those now urged from the same standpoint. But until some good reason, not yet appearing, can be assigned for excluding tunnels intervening between the location and patent of a conflicting mining claim from the operation of the rules defining the rights of senior locations, we respectfully submit that junior tunnel sites, like other junior locations, must be postponed to those which being senior in time are senior in right.

Counsel concede that there are locations of claims made upon discoveries in extending tunnels which must adverse applications for patent to lode claims covering the same premises. But suppose that at the time of such application the tunnel-owner, though making his discovery, has not seen fit to follow it by a lode location, or that by running his tunnel entirely through the ground in controversy he has determined the fact that no vein can be found there, must he not in the first instance, his right having become tangible and certain, adverse and contest for his protection under the statute?

And has he not in the latter case resolved the contingency into the certainty of its non-existence, and shown that there is nothing his tunnel can find, and consequently nothing he can ever claim within the boundaries of his neighbor's premises? Counsel say (p. 19): "In this case there had been within the territory now involved no discovery of a blind lode in conflict with the claims of the petitioner at the time of the application which would have entitled it to file an adverse, nor are the rights here in dispute of such a nature that had they existed at the time of the application for patent the tunnel-site locator would have been entitled to file an adverse and assert the same."

This expresses our contention fully. And when it is recalled that there is nothing in the record to refute the presumption that the development was made and no discovery

found at the time of our application, it is obvious not only that respondent had nothing, but could not by any possibility have anything within our ground upon which an adverse could be predicated. That being so, what right can it now assert against our patent?

But it is claimed that our contention that, our claims having passed to patent, the question of discovery is conclusive, is contradicted by the allegation in the complaint that the veins therein were discovered on January 2, 1892. Not so. Government mineral patents do not refer in general to the date of the inception of the rights of the patentee, any more than do those granted on applications for agricultural lands. Hence we allege date of discovery as shown in the patent application, and appearing as the first link in our chain of title, in order to establish the inception of our right at a time anterior to anything the respondent can claim. Thus Mr. Lindley, citing a large number of authorities to support the statement, says:

"It is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inauguration of the right, *that is, to the location upon which the patent proceedings are based*" (2 Lindley on Mines, sec. 783).

The location upon which the patent proceedings were based in the case at bar recite January 2, 1892, as the date of discovery. The amended locations of September 3, 1892 (Transcript, pp. 123–'5), made under the State statute, both recite that the lodes were "originally located on the second day of January, 1892," and that the amendments are made "without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location description or record." The Land Office in adjudicating upon the discovery necessarily found this to be the date, and as declared in the Utah case cited upon the corresponding allegation of the complaint and the proofs to support it was perfectly proper.

But counsel seems to think that proof of the averment was not sufficient from the mere introduction of the certificate. This would be so if either claim rested for its title upon the location merely. But it does not. Its location has been perfected as against all the world by its patent and its conclusiveness thereby secured. Of what avail is a patent if when the title is assailed the patentee must prove *aliunde* his compliance with all the precedent requirements for obtaining it? Counsel would have this court believe that trials affecting the right of possession to unpatented public domain, instituted under statutory requirements, and ejectment based on title in fee-simple are identical. They misconstrue the purpose of the averment, which fixes the beginning of our right as offering an issue of fact upon discovery which they may assail regardless of our absolute title.

If the question were an open one, and this was an adverse proceeding waged to inform the Government whose claim of possession is the better, we would not be here denying respondent's right to dispute our location certificates, and, if possible, to defeat it by any line of legitimate testimony. But it is no such case, and counsel fully recognize the fact when they say in effect, "Of course we cannot deny your patent. It is conclusive as to discovery. But we have the right to show that it must have been made twelve days after the record says it was. This right is ours merely because our tunnel is eleven days younger than your lode claim. If it was eleven years younger, then our right would extend for twelve years instead of eleven years. The age of your title depends on the age of the claim that would assail it, provided only the claim precedes your entry. You have a good title, but we can show when it commenced to be good, and that commencement was immediately after we surveyed a tunnel site across it." With all respect for this court and for the great ability of respondent's counsel, is not this position preposterous? Every Government grant of title to

land, of whatever character, must depend upon rights acquired to it before and upon which the grant is made. To say that it takes effect from its date only, is to destroy it in nine instances out of ten, and to seriously impair it in the tenth.

The case of Fisher *vs.* Seymour, 23 Colo., 542, cited by counsel as supporting the doctrine that a patent may be shown by parol testimony to have taken effect at a time different from the date of discovery given in the patent proceedings, is of no force as an authority here. The action was brought to enforce a trust relating to mining premises in which both trustee and beneficiary were interested. The trustee had, in violation of his fiduciary duty, sought to defeat the title of the *cestui que trust* in the premises by abandoning the original discovery and founding the patent proceedings upon a later and distinct one and under a different name. In this he succeeded, and then defended against the suit *inter alia* upon that ground. Both parties claimed under the same patent, but the beneficiary's right to enforce the trust depended upon her ability to expose the fraud of the trustee in so manipulating the patent proceedings and the patent thereby obtained as to destroy her equities and vest himself with the legal title wholly discharged of the trust. The supreme court of Colorado, as a matter of course, defeated his purpose by sustaining proof of the fraud and based the patent title upon the original discovery to the end that the complainant's equities in the patent might be sustained. It could not have done otherwise. But no such conditions exist here.

Evans *vs.* Durango Coal Company, 25 C. C. A., 531, is quoted by counsel with much confidence. The action was trespass, and damages were demanded from defendant for mining coal from lands on which plaintiff had filed a declaratory statement on October 2, 1880. The statement was suspended five days afterward by the Commissioner of the General Land Office. While suspended and on December 1,

1881, one McMaster entered the land, which he had previously and on November 26, 1881, conveyed by warranty deed to one Bell as trustee. On January 27, 1892, nearly eleven years thereafter, plaintiff attempted to make final proof of entry, whereupon a contest was ordered, resulting in the annulment of the McMaster entry, whereupon the plaintiff's entry on December 31, 1894, was accepted, followed by patent on February 28, 1895. The coal was mined from 1881 to the date of the suit, and the claim of the plaintiff involved the reopening of the relation of the patent back to the declaratory statement of 1880. The majority of the court held that a patent would not take effect as of the date of the initial step taken by the patentee to obtain title when it appears from the allegations of the complaint that the rights by him acquired by such initial step *were lost by his lack of diligence.* "Without some further allegations," said Judge Thayer, "showing how it happened that no action was taken by Evans toward perfecting his claim between October 2nd, 1880, and June 27th, 1892, although for the greater part of that time the defendant company was in possession of the land, and mining coal thereon, the inference is clear that he must have been guilty of gross laches in prosecuting his claim and in asserting his rights; *and such laches on his part would seem to be a sufficient reason why his patent should not be given effect by relation as of the date when he filed his declaratory statement.*"

Apart from the ground upon which this departure from the general doctrine of relation is justified, is the interesting fact that his honor Judge Sanborn then dissented from the conclusions of his brethren. He said: "As I read the complaint in this action, it shows that a competent quasi-judicial tribunal decided, in a case of which it had jurisdiction, that the defendants in error, and those under whom they claimed, never had any right or title to the land from which they wrongfully removed the coal in controversy, and that the plaintiffs in error, or one of them, Roger C. Evans, had, dur-

ing all the time after 1880, a right to the possession and use, and a preference right to enter the land, which eventually matured into a title. *It does not appear to me that there is any occasion to abrogate or evade the settled doctrine of relation in order to take from those who, according to the unassailable judgment of the Land Department, had a right to this land and its products, and to give those who never had any such right the coal which the latter wrongfully took from it and which may have constituted its chief value.*"

It is apparent that the efficacy of this decision is in the contrast between his Honor's past and present views concerning "the settled doctrine of relation."

The cases of which Last Chance Company *vs.* Tyler Company, 61 Federal Reporter, 557, is a type have never up to this time been recognized by this court. The doctrine may be ultimately established, and we are not disposed to here question its equity. Its purpose is to give effect to the recitals of section 2336, relating to the union of veins upon their dip and descent into the earth. After the union it belongs to the *senior location* at the surface. By senior location is or should be meant that which is disclosed in the patent proceedings to be the elder. The seniority of location is determined in the Tyler case by the time when the vein was actually discovered on the claim, although that time is proved to be some other than that recited in the patent proceedings. Whatever may be said for or against the rule, there is no reason for its application to the issue here involved. If the respondent has any rights as against the petitioner, it is to something within the territory of the Ocean Wave or Little Mary claims, not to something elsewhere, but supported by the presence of the thing itself within our vertical boundaries. It is something, too, which inheres to it *ab initio*, and by virtue of the superiority of the tunnel location *to the ground in controversy.*

The respondent has a difficult task to meet and overcome the last clause of Mr. Justice McKenna's opinion in the

Calhoun-Ajax case. It is clear, explicit, conclusive, unmistakable, and, unfortunately for the respondent, it is incapable of misconstruction. The patent relates back to the discovery. The law has been so frequently enunciated and so long enforced that a citation of authorities to support it is unnecessary. And so counsel give us a long quotation from the opinion in Carroll *vs.* Carroll, 16 Howard, 275, the general effect of which is that *obiter dicta* are not controlling—a conclusion which no one seriously controverts. But there is nothing *obiter* in this decision. The last proposition presented and argued was whether or not the plaintiff in error should have been allowed to introduce evidence to show no discovery of mineral in place on the lode claims crossed by the tunnel prior to the location of the latter. The concluding paragraph of the opinion is the only part of it dealing with that question. It was "one of the very points presented." The decision would have been incomplete without it. Counsel must therefore remain with Judge Sanborn in contending that the decision cannot affect a tunnel located prior to entry of the lode claim, or concede our contention that it is conclusive here.

The brief of plaintiff in error in the Calhoun case vigorously pressed this assignment upon the court. It asserts: "A patent is a grant of the legal title;" and had the patent issued prior to the location of the tunnel, we would not discuss this question. We are not attacking the validity of the patent; we simply desire to show that it relates back to the inception of right only. If there were no discovery of mineral in place when the receiver's receipt was issued, the entry would be void. Receiver's receipt does not create a right; it only protects such rights as have already been created; patent relates back to inception of right only. Land must be legally appropriated in order to sever it from public domain. When patent issues the fact that mineral was discovered before issuance of patent is settled. This is not the case with receiver's receipt; that instrument may be canceled

by the Land Department at any time before the issuance of patent by showing that there has been no discovery of mineral in rock in place within the limits of the location. Thus the question arises, To what date does the patent relate? The decisions of this court are not in harmony upon that point. As far as we can determine from the various decisions, the patent relates back to the discovery of ore within the limits of the location; and if there were no discovery of ore within the limits of the claim of the defendant in error at the time of the location of the Ithaca tunnel site, then the patent does not relate back to a time prior to the location of the tunnel.

"*Our purpose in offering to show these facts was that our tunnel might be adjudged to be superior in point of time to the Monarch and Mammoth Pearl claims, and thus make the patent subject to the rights of the tunnel and invoke the law as announced in Enterprise Co. vs. Rico-Aspen Co., and Ellet vs. Campbell.*"

Counsel for defendant in error in that case were quite as insistent in their opposing contention. The principal, or at least the most valuable, feature of that controversy consisted of the blind veins which the tunnel had intersected within the territory of the defendant company. Hence the plaintiff might well have claimed a favorable decision, had the court, by failing to pass upon the question, left it open to debate.

It was also presented in that case and decided by the supreme court of Colorado. "Such rights," says the court, "as are conferred by a prior valid location, so long as it remains in full force and effect, are preserved from invasion, and cannot be infringed upon or impaired by subsequent locations * * *, and are as fully protected under the rules of the common law as any other classes of real estate. Under the statutes, the subsequent locator has no right to penetrate a senior valid and subsisting location underneath

its surface boundaries extending downward vertically, except for the purposes specified in the mining law * * *. These exceptions do not include a right to drive a tunnel through such a location for the purposes of discovery * * *. Our construction of section 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend the tunnel through previous valid locations."

Tracing the record of the Calhoun case back to its origin and its trial in the district court of El Paso county, Colorado, we find this question running through it and constituting from the outset a vital feature of the plaintiff's claim. This court, it is true, disposed of it somewhat abruptly and as one without merit, but that cannot alter the fact.

The supreme court of the State had the benefit of the views of his honor Judge Hallett, of the Colorado district, upon the question in a case entitled Stratton *vs.* The Gold Sovereign Mining Company, where the defendant insisted upon a similar right of way and a similar ownership of blind veins intersected *en route*. In that case his Honor granted the complainant's application for an injunction restraining the defendant from prosecuting work upon its tunnel within the boundaries of the complainant's lode claim, older in date and therefore senior in right to the tunnel, saying that "the territory covered by such location has been severed from the public domain and has become private property which is no longer open to a new location."

His Honor then refers to the several classes of mining locations authorized by the Federal statute, and concludes:

"When a location has been properly made in either class, *and so long as it shall be fully maintained by use and enjoyment or by patent*, the territory embraced in such location is not subject to adverse location by a claimant of the same class or any other class * * * Assuming the John A. Logan location to have been well made in the month of September, 1891, and maintained thereafter, the grantors of

respondents could not afterwards locate the same territory by a tunnel, or in any other way."

His Honor added that "the Rico Aspen case reported in 167 U. S. was the subject of much comment at the bar, but it does not appear to have any bearing upon any question presented in this record."

The supreme court of Colorado summarized its own conclusions upon the subject by declaring that section 2323 "provides how inchoate rights to blind veins may become absolute, but nowhere does it in terms, either expressly or impliedly, declare that for these purposes it (the tunnel) may be projected into or across prior valid locations. To give it the interpretation that it does is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the sections preceding and overthrows the doctrine of priority, the foundation upon which mining rights rest. It does not provide that under a location for tunnel-site purposes a right is granted to search for mineral in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain."

This conclusion is the necessary deduction from the construction given to section 2322 of the statutes by this court in Del Monte Company *vs.* Last Chance Company, 171 U. S., 55. By that decision the locator of a lode mining claim "is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines."

Section 2322 *gives these rights to "the locator."* The patentee is not referred to in the section. The locator may, but need not, patent his claim so long as he complies with the other requirements of the law relating to possession, he has every possible right to the premises that a patent can confer. The latter merely removes or are supposed to remove these rights from the sphere of possible contest, and relieves the owner

from the necessity of making annual expenditures upon the property. When issued, it recites the phraseology of section 2322 and finds warrant in that section as well for all that it excepts, save matters relating to surface rights of way. Hence, there can be no right in a tunnel-owner upon or beneath an unpatented senior lode location that cannot be also asserted or claimed upon or beneath a patented one.

The judicial history of the mining act of 1872 is essentially brief, yet it discloses many efforts to confine the grant of a mining patent within limits much narrower than the language and purpose of the act would justify. All of them have failed in this court, which time and again has declared that neither the Department nor the courts can import into a mineral patent any exception from its granting clauses not warranted by the language of the act itself. The one here insisted upon is not only unwarranted; it is in conflict with the recitals of section 2322; and the argument that it consists merely in locating the date of the operation of the grant and is entirely consistent therewith must be rejected when it is perceived that the purpose of postponing the date of the initiation of the grantee's title is to substitute for the grant a title not only hostile to, but practically destructive of it (Davis *vs.* Weibbold, 139 U. S., 507; Deffeback *vs.* Hawk, 115 U. S., 392; Talbot *vs.* King, 6 Montana, 76; U. S. *vs.* Iron Silver Mining Co., 128 U. S., 673; 1 Lindley on Mines, secs. 171, 175).

Blind lodes, as the miners call them, predominate. Those which come to and are visible from the surface are the exceptions, especially where the bed rock is covered by debris and the usual accumulations of soil and vegetation. A tunnel location, if good, segregates an area of 3,000 by 3,000 feet of mineral domain, and excludes the prospector from its surface unless visible or known ore deposits exist within it. This area is the equivalent of twenty lode mining claims 1,500 by 300 feet in dimensions, that being the maximum size of lode claims in Colorado. He who does this should

take care to select a territory not previously located, for the law will not tolerate the exercise of such a right in or upon that which has been appropriated by another.

Counsel emphasize the recital of the statute that no location of a mining claim shall be made until the discovery of a vein or lode within the located premises. There can be no dispute about this requirement, but counsel overlook the fact that discovery is conclusively presumed after patent. It is one of the things adjudicated by the Land Department as indispensable to the issuance of the patent, and it goes back to the time when the patent proceedings disclose the fact. *Indeed the prohibition of the statute makes it unavoidably essential that the Land Department should find that discovery was made before location, or its grant of the patent would be not only unjustifiable, but unlawful.* Hence the patent means not alone that the fee has been conveyed to the patentee, but that the latter, in compliance with the requirement of the law, made a discovery before location.

Before leaving this subject we must refer to respondent's offer of proof and exception relating to the discovery of veins in the petitioner's mining claim. They appear on page 86 of the transcript. The witness Mason was asked: "At the time of making out the location certificate of the Uinta tunnel on the 18th day of February, 1892, state if you know whether there had been a discovery of mineral in either of the discovery shafts of the Ocean Wave and Little Mary Lode mining claims, or in any other place upon either of said claims."

Objection to the question was sustained; whereupon respondent offered "to prove by this witness, that at the time of the location of the Uinta tunnel in February, 1892, *and for more than a year thereafter* there had been no discovery whatsoever of any kind, nature or description of ore in the discovery shafts of either of the Little Mary or Ocean Wave lodes and mining claims, or upon any other part or portion

of the territory embraced within the surface boundaries of either of said lodes and mining claims."

This offer is not warranted by the record. It fixes the 18th day of February, 1892, as the date of the tunnel location and assumes the right to attack the plaintiff's patent at any time before the 18th day of February, 1893. What warrant has the respondent for assuming to locate the inception of petitioner's title as of February 18, 1893? Does not the assumption disclose the danger of disengaging the patent from the location, and thereby permitting or at least suggesting to the self-interest of outsiders the expediency of attaching the inception of title to any period late enough to admit the seniority of their own claims? The offer was palpably outside of the record and properly rejected. Besides, the record of February 18, 1892, is not that of a tunnel, but of a so-called "tunnel claim" 1,500 by 3,000 feet in dimensions—something wholly unknown to any law, State or Federal.

Counsel's argument in favor of an estoppel remains to be considered. Its answer, page 60, paragraphs 13 and 14, is that it has in prosecuting its tunnel expended more than one hundred and twenty-five thousand ($125,000) dollars in and upon the tunnel; "that the same has been at all times prosecuted *under the claim of the defendant and its grantors of the right to do so by virtue of the location of said tunnel and tunnel site location under and by virtue of the laws of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of and in reliance upon said statute.*"

In other parts of the affirmative answer respondent says that the petitioner knew of the expenditure and did not oppose it, and that the consent thus manifested has ripened into a license to occupy and enjoy petitioner's premises, &c.

This claim is subject to three serious criticisms, if they are to be considered as intending to assert a title by estoppel *in pais*. The first is that there is no allegation that the ex-

penditure and entry preceded the commencement of the action; and the gravity of this omission is manifest from the added circumstance that the answer was not filed until two years seven months and twenty-six days after the commencement of the suit, during which time no judicial restraints upon the defendant's operations were imposed.

The second is that the defendant alleges its expenditure and improvements were made by virtue of its location and the rights thereby conferred upon it. It makes no pretense of having acted by virtue of or in reliance upon any act, statement, or conduct of the plaintiff, or that it was misled or deceived thereby. Lastly, it knew of the plaintiff's fee title to the premises, and so knowing could not have been misled to its injury or otherwise. And so the essential elements of an estoppel *in pais* are entirely absent from the record.

Respondent's offer of proof of this condition is equally defective (Transcript, pp. 88–89). It offered to prove by the witness Doyle "that he expended in and about the driving of the bore of the tunnel the further sum of fifty thousand ($50,000) dollars; that no objection was made by the plaintiff against the working of the tunnel; that no objection was made by them until the tunnel was driven to its present face (this was in January, 1902), a distance of 1,100 feet beyond the easterly side line of the Ocean Wave lode, and then objection was only made when the then owner of the tunnel had uncovered and discovered a vein of ore from which he was mining, extracting, and selling rich and valuable bodies of ore."

Defendant also offered "to prove by this witness that at the time the bore of the tunnel was being driven through the Ocean Wave and Little Mary lodes the then officers and agents of the plaintiff, the owners of the Little Mary and Ocean Wave claims, *acquiesced* in the driving of said tunnel through said property."

There is no pretense here of any ability to prove that this acquiescence or inaction misled the respondent, that it in any manner relied thereon, or that any expenditure was

made on the strength of it or would have been withheld on plaintiff's objection; neither is there any pretense of ignorance of the rights of the plaintiff or the character or extent of its title.

The authorities quoted by counsel on the subject of estoppels are doubtless sound, but wholly foreign to the facts at bar. It is unnecessary, perhaps, to so much as remind this honorable court that estoppels by conduct are only established and enforced where the conduct was intended to or did actually mislead another, to his injury; that the latter was ignorant of the true state of facts to which the conduct relates; that his subsequent action, expenditures, and proceedings were done and made in reliance upon such conduct, and that the acts constituting it were done with the intention that they should be relied on. None of these elements are here present.

Estoppels to be effective must be mutual. Respondent relied on its own legal rights with full knowledge of those of the petitioner; it took no step and incurred no obligations on account of any act or omission of the petitioner. Mutuality of estoppel is therefore wholly wanting. The circuit court of appeals made no reference to the alleged defense, and it is apparently urged here for lack of some more plausible ground to support that court's decision.

Allusion was made in or al argument to the fact that the grant under section 2322 is to the exclusive right of possession of all the surface included within the lines of the location, and of all veins, lodes, &c., within such lines; and emphasis was laid upon the reference of that section to the possession of the surface, from which it was argued that the tunnel claimant, possessing rights of a subterranean character, might exercise them in harmony with everything granted to the owner of the lode location.

Without conceding this deduction, it may be fully answered by calling attention to several facts wholly incon-

sistent with it. In the first place, the so-called tunnel location is made upon the surface, and consists, not of a mere line, as counsel contend, but of a square of surface territory 1,500 by 3,000 feet in dimensions and comprising 103.30 acres in extent—a location unknown to the law and without warrant (Transcript, pp. 138–139). The only record location possible would be a description of the line of the tunnel, not a piece of territory equal in extent to ten lode locations.

But in the answer the respondent asserts (Transcript, p. 39) that the locators afterwards marked the claim upon the surface, and designated it upon the ground by a line run through the trees and underbrush upon the mountain, and by stakes set at intervals along said line, duly marked with the name of said tunnel site, so that it could be easily designated upon the ground by a line run through the trees and underbrush upon the mountain, and by stakes set at intervals along said line, duly marked so that the same could be easily designated upon the ground *and upon the surface thereof.*

Here, then, is a surface claim, a marking of the same, and an invasion and appropriation of our surface.

This court in the Rico-Aspen case recognizes the right of a tunnel owner, upon intersecting a vein, to go upon the surface and locate a lode claim thereupon. This right is an inchoate one, having its inception with the location of the tunnel and maturing upon the discovery of the vein in the tunnel. When so located it relates back to the date of the location of the tunnel. Hence a tunnel location, if valid, carries potential surface rights which may become superior to those of the lode location of another across its right of way and irreconcilable with the surface rights conferred thereon by the terms of section 2322. Is it not plain that the integrity of this section can be maintained against the pretensions of tunnel claimants under section 2323 only by applying the doctrine of the Calhoun-Ajax case to all junior

tunnel locations, whether the senior lode locations they cross have been patented or not prior to the tunnel location?

We submit the case with confidence that such will be the conclusion of this honorable court.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D., 1904.

No. 18.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, RESPONDENT.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER.

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SUPPLEMENTAL BRIEF OF PETITIONER.

The assignment of this case for re-argument has suggested this addition to the briefs upon which it was previously submitted. Our purpose is to cover a little more fully some of the arguments hitherto advanced for the petitioner, rather than to introduce new lines of discussion. If the task is deemed unnecessary, we may be excused for its performance by pleading the importance of the issues involved, which

have been emphasized by the action of the court in requiring its re-argument.

THE GRANT OF THE PATENT.

The patent from the government to the petitioner is in the usual form, and contains the usual conditions and exceptions, *and those only.* They are:

> "First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundaries of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.
>
> "Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local laws, customs and decisions of the courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.
>
> "Third. That in the absence of necessary legislation by congress, the legislature

of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to its complete development."

The analogy suggested by his honor, Judge Sanborn, between the decisions of the Ninth circuit in cases involving dip rights between veins patented to different lode claims, and the principle applied by him to the case at bar, disappears when it is considered that in the one case external evidence as to the actual date of the discovery was admitted to determine which of two patented lodes containing the same exception should prevail; whereas, the decision in the case at bar incorporates a new and distinct exception in the patent, not appearing in its recitals, not justified by its terms, and not warranted by the law. If it prevails, a fourth condition is incorporated in the patent, reading virtually as follows:

> "That the premises hereby granted may be entered by the proprietor of any tunnel located across the same at any time after its location and before its entry, either to drive said tunnel across said premises for the discovery of veins not previously known to exist therein, or for the pursuit of such veins and the operation thereof beyond said premises. And all veins intersected by said tunnel within said premises not know to exist previous to the location of said tunnel are hereby excepted from this grant, and the same shall belong to and become the property of the proprietor of such tunnel."

Such an exception can find no support in the statute, nor in any section thereof, nor in any decision construing it. Section 2323 provides that:

> "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel or veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel shall be invalid," etc.

No vein not previously known to exist, or otherwise, was ever discovered in respondent's tunnel within petitioner's ground. This court has said the tunnel owner has no right of way by implication. The lode claims were located prior to the tunnel, yet it is held that our patent means less than it says, and conveys less than it purports to grant.

It has been frequently held that the land office can not insert conditions or exceptions not authorized by law in a patent.

> Deffeback vs. Hawke, 115 U. S., 392.
> Clary vs. Hazlitt, 67 Cal., 286; 7 Pac., 701.
> Talbot vs. King, 6 Mont., 76; 9 Pac., 434.
> Silver Bow Co. vs. Clarke, 5 Mont., 378; 5 Pac., 570.

Davis vs. Weibbold, 139 U. S., 527.

Smokehouse Lode Cases, 6 Mont., 397; 12 Pac., 858.

1 Lindley on Mines, 171.

If the reservation intruded into the patent by the Court of Appeals had been inserted in terms by the land department, the courts would have stricken it out. That which can not be expressly excluded from our grant can not be excluded therefrom by construction or implication.

Some years ago attempts were repeatedly made to make patents for lodes, covered by townsites, subject to the rights conveyed by the townsite patent, or claimed by squatters. These attempts were founded upon alleged fraud in securing the lode patents, in showing either that no lodes or minerals were included within their boundaries, or that the rights of the assailants pre-dated the patents and were known to the lode patentees. These claims were sought to be founded, as they are here, upon statutory provisions, but in every instance, so far as we know, they have been rejected, even where, as in the Smokehouse cases, the lode patents contained express exceptions covering the alleged rights contended for. And practically all of them assert the fundamental proposition that in actions at law the patent is conclusive evidence of the efficiency of the location.

Talbot vs. King, supra.

Davis vs. Weibbold, supra.

Chambers vs. Jones, 17 Mont., 156; 42 Pac., 758.

U. S. vs. Iron Silver M. Co., 128 U. S., 673.

Montana Railway Co. vs. Migeon, 68 Fed., 811.

Iron Silver M. Co. vs. Campbell, 17 Colo., 276.

Justice M. Co. vs. Lee, 21 Colo., 260; 52 Am. St. Rep., 216.

Every reason advanced for these decisions applies with added force to conditions here presented. The respondent does not so much as claim a vein discovered in our ground. It expressly declares it has not done so. It claims to have made some discoveries elsewhere since the commencement of this action, and it has bought a claim called the Black Jasper, located from the surface, and containing a small fraction of an acre, which it declares it can work by using our premises as a thoroughfare, because, forsooth, it is not concluded by our patent.

If the Court of Appeals is correct, and the respondent may show that the petitioner's grantors discovered no vein in their locations prior to the tunnel location, so far as they may contain "veins not previously known to exist discovered in such tunnel," the patent does not cure the difficulty; and hence, if there be but one vein in each claim, and those the discovery claims respectively, and not appearing at the surface, which the tunnel intersects, they belong to respondent, notwithstanding they are the identical veins patented in terms to the petitioner, the discovery of which the patent conclusively establishes.

We may put this proposition in another form. By our patent we are protected down to the date of entry.

But respondent shows that the day before entry we discovered a vein which is the vein patented, which was not previously known to exist. It is the only vein in the claim, and it is also discovered by the tunnel. Judgment must be for respondent, and our patent is worth less than the parchment on which it is written.

This illustration is in no sense imaginary. Lode claims seldom embrace more than one vein, and those veins rarely appear at the surface. They must be discovered by excavation before they are known to exist. If, in the case at bar, the petitioner's grantors did not make their discovery of such a vein between January 2d and January 13, 1892, they are at the mercy of the respondents, whether they made it on the 14th of January, 1892, or at any other time thereafter. Making it after, the patent is just as ineffective, for the right to such veins, if they exist at all, belongs to respondent so long as it continues work on the tunnel without reference to the nature of petitioner's title. For if such a right is destroyed by patent, there is an end to respondent's claim, and we must prevail. If not destroyed by patent, the time when respondent discovers and claims it is immaterial. There is no escape from this conclusion.

RESPONDENT'S CLAIM OUTSIDE OF STATUTE.

The petitioner's patent certainly gives it everything which section 2323 does not give to the respondent. We have seen that if properly and previously located the respondent's tunnel would have the right

of possession of veins not previously known to exist discovered in such tunnel. More than this it can not have. But we have also seen that, confessing the absence of any such thing in petitioner's territory, it demands an absolute and perpetual right of way across our claims. And in doing this it does not so much as negative the validity of our locations. For it is nowhere alleged that the Ocean Wave and Little Mary lode claims were not located upon a lode "not appearing at the surface." A location upon a lode appearing at the surface is good even though junior to the tunnel. But respondent contents itself with the broad assertion that the petitioner never at any time discovered any lode or vein within its claims. It confesses the tunnel never did, and then asks to invalidate our patent. Such a claim is wholly outside of the statute.

THE TUNNEL CLAIM.

The Court of Appeals declares that the action of the land office in granting patent to petitioner did not conclude the respondent as to any conditions antedating the entry. If privies are bound, it must follow that the respondent, being privy to the United States, possesses nothing in the land conveyed which the United States does not possess. And we have attempted to show that every reason which makes the patent conclusive from the date of entry must make it conclusive from the date of location, or it affords no protection to the patentee.

It remains to consider somewhat more at length than in our reply brief the fact that the respondent is

the owner of a tunnel *claim*, and not a tunnel *site*, a surface location, and not a tunnel line. On February 25, 1892, respondent's grantors filed for record a location certificate of the Uinta Tunnel claim, reciting that on the 18th day of February they claimed by right of location a tunnel claim, which is described by metes and bounds as a parallelogram 1,500 by 3,000 feet in dimensions, and embracing the territory covered by petitioner's patents (Transcript, pages 138-9). They thereby assumed to segregate before any discovery a large area of the public domain and exploit it with a tunnel, whose bore was placed midway of the northwest end line of the claim. This is the only location of the tunnel ever made or attempted.

The right asserted by this location was a surface one, and in conflict with every foot of territory covered by petitioner's application for patent. It was tangible, immediate and positive. Its owners were bound to assert their right to possession by adverse under the provisions of the federal statutes, and, failing to do so, their tunnel claim as to the petition was lost. It is no answer to this contention to aver that the tunnel is within the claim. The latter was recorded; it is the assertion of whatever right the locators possessed or claimed; if it was valid, the duty of adversing our application for patent existed; if it was void there was no location of the tunnel whatever, and, therefore, no right in the owners to the premises, either contingent or otherwise. Rule 18, of the land office, requires a record of tunnel sites. No such record is disclosed by the transcript; it was never made, and the location certificate set forth in the record furnishes the measure and the limit of the respondent's right.

Can such a location be said to confer a right that is uncertain, contingent or remote? If so, any surface location would be exempt from the duty of adversing a patent application for a lode claim. It may be true that such a location is not authorized by the provisions of the federal or state mining law. But some record is necessary, and we must take what we find and apply to it the requirements of the statute concerning conflicting rights of possession to surface rights on the public mineral domain.

Our entry was made in August, 1893. For four years our claims were undisturbed. Not until the respondent purchased the Black Jasper was there any assertion of a prior right to our premises, or any part thereof. Not until after the suit was brought did the respondent make any discovery of any vein with its tunnel anywhere. If the doctrine of the Ajax-Calhoun case is to be limited in its general application, this is not the case, nor is the respondent the party entitled to the benefit of the limitation.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, *Petitioner*, vs. THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, *Respondent*.	219.

Memorandum of Points and Authorities by Counsel Amicus Curiae.

My apology for requesting the indulgence of the court, briefly, at this time, is the interest of clients whom I represent in cases pending before the United States Circuit Court and Circuit Court of

Appeals; aside from the vital importance of the question involved as a general proposition in mining law, the decision here pronounced may be controlling at the hearing of those cases; in them, as in the case at the bar, reliance is placed by both court and counsel upon the decision of this Honorable Court in Calhoun G. M. Co. vs. Ajax G. M. Co., 182 U. S. 499.

I.

Nature of the Controversy.

The facts disclosed by the record show, as will hereafter more fully appear, that the tunnel location upon which respondent relies is junior to the lode locations of petitioner; that is, the date of the tunnel location is several days later than the date of the lode claim discoveries of mineral as fixed in the location certificates thereof, upon which the patent issued.

Respondent, in the trial court, undertook, notwithstanding the issue of patent, to introduce oral evidence for the purpose of attacking the lode locations by attempting to show that no mineral had been discovered at the time the location certificates were filed, or at any time until after the location of the tunnel site. But the trial court, accepting the law of the Ajax and other cases without qualification, rejected this evidence. On appeal the Circuit Court of Appeals, in reversing the judgment, held the evidence so rejected to have been admissible.

This Honorable Court, in deciding the Ajax case, and in discussing a similar offer of proofs, says:

> "An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca Tunnel Site no ore had been discovered in the two patented claims of the defendant in error, to-wit, the Monarch and the Mammoth Pearl. The ruling was right *The patents were proof of the discovery and related back to the date of location of the claims; the patents could not be collaterally attacked.* This has been decided so often that a citation of cases is unnecessary."

At first blush it would seem that the offer of proof touching the discovery of mineral in the patented claims and the approval of such offer by the Court of Appeals are inconsistent with the foregoing clear and emphatic declaration of law by this court. But the learned judge who wrote the Court of Appeals opinion distinguishes between the two cases; he holds that the language employed by Your Honors in the Ajax case must be construed with reference to the facts there shown; and that that decision is, therefore, only authority for the proposition that the patent is conclusive as to the discovery of mineral at the date of entry; that the tunnel locator may challenge the original location and show that no mineral had been discovered at the date therein specified. And counsel, upon the hearing in this court, are urging with great earnestness and vigor the correctness of this view of the law and interpretation of the Ajax opinion.

But I most respectfully urge that there are two all-sufficient and conclusive answers to the position thus taken—

1st: The proposition above quoted, laid down by this court in the Ajax case and previously sanctioned by other courts and law writers, to the effect that the patent relates back to the location (that is to the acts of location including the discovery of mineral *as shown* in the patent proceedings) and is conclusive upon all such questions as the date of the discovery of mineral, is applicable to the case at bar. With all due respect to the court pronouncing the decision under review, I firmly believe that the general proposition laid down without limitation by Your Honors in this instance is strictly in accord with recognized legal principles touching the scope, effect and conclusiveness of United States patents to mining lode claims.

2nd: But another and, to my mind, all sufficient and conclusive answer to counsel's argument and to the position of the court below, is that respondent, by failing to adverse petitioner's application for patent, has waived its right to now raise this question.

Upon the first of these subjects Governor Thomas and the other counsel associated with him have left nothing for me to say. Their printed arguments are so lucid, strong and persuasive that it would be presumption on my part were I to attempt to add anything. I will, therefore, both in this brief and at the oral argument, limit myself to

the second proposition. And even in this I am embarrassed by the feeling that what I shall say may turn out to be only cumulative.

II

Failure to Adverse, Decisive

First: The following facts are shown by the pleadings and record in this cause:

That the tunnel location *was attempted* to be made in the manner prescribed by land office regulations and recognized by the courts; this means, among other things, that a notice was posted at the face of the tunnel, that the line of the tunnel for its full length was run and staked on the surface, and that a location certificate containing proper recitals was filed with the Clerk and Recorder —Lindley on Mines (2d Ed.) Sec 472; also that such location was made for the purpose of developing veins or lodes and discovering mines.

That the line of the tunnel was laid across petitioner's claims, and the tuunel was eventually extended through those claims for the distance of 625 feet; that at the time of such tunnel location respondent neither owned nor controlled any veins or lodes on the line of the tunnel beyond petitioner's territory—the "Black Jasper" referred to in the pleadings not being even *discovered* till five years later; that at no time did respondent ever discover any blind veins within the territory of petitioner—the only blind veins alleged to have been cut by

the tunnel being a long distance beyond petitioner's territory and in no manner appearing therein.

That the tunnel location was made or attempted to be made on the 13th of January, 1892; that the patent proceedings for the lode claims of petitioner were not instituted till several months thereafter, and patent entry was not made until the 5th of August, 1893.

Thus, it conclusively appears by the record that over eighteen months elapsed between the date of the tunnel location and petitioner's lode claim entry for patent. Respondent must have known of the existence of the lode claim locations and of the proceedings for patent; no fraud or deception appears to have been in any manner practiced, and respondent had ample time and opportunity to file its adverse in the Land Office on behalf of the tunnel location and begin its adverse suit. It deliberately chose to stand by and do nothing. Instead of proceeding under the adverse statute especially provided for such purposes, to challenge the regularity of petitioner's locations and the date of discovery of mineral in connection therewith, it allowed petitioner to proceed to patent without the slightest objection or protest. Whether such inaction on the part of respondent was due to the fact that when petitioner's proceedings for patent were pending, and at the time entry was made, *no blind vein had been discovered in the tunnel*, of course I do not know. But, as I view the law, neither such fact nor the other fact,

above mentioned, that respondent then possessed no vein beyond petitioner's territorry *to be developed by its tunnel*, was a sufficient excuse for the failure to adverse.

Second: Even a cursory examination of the mining laws of Congress will satisfy any one that it is the evident purpose of their framers to have tried and determined *prior to the issuance of patent*, so far as possible, through adverse proceedings, all questions pertaining to the conflicting claims of third parties or to the regularity of claimants' acts, upon which acts the patent is based. And a recognition of this purpose is just as important where the contesting party relies upon a tunnel location as where he relies upon a lode or placer location. There is quite as much reason for requiring all such questions to be adjudicated prior to patent in one instance as in the other.

In an adverse suit brought on behalf of a tunnel location substantially the same contentions will naturally arise as in such a proceeding between lode locations. The tunnel owner may challenge the citizenship of the locator, the discovery of mineral, and performance of the other acts necessary to a valid lode location, as well as the expenditure upon the claim of five hundred dollars by the applicant for patent; on the other hand, defendant in the adverse suit may dispute the regularity of the tunnel site location, and may put upon proof *its priority* and the reasonable diligence of its owner in running the tunnel.

As we will presently see, the courts have held that while an adverse is necessary for a blind vein already cut in the tunnel, it is not necessary for a tunnel owner to adverse the lode patent application *for blind veins* which have not been and may never be discovered in the tunnel. But this is no reason why all the matters above mentioned, preliminary to patent may not be presented and tried upon a tunnel adverse *for the right of way.*

I use the phrase "right of way" for want of a better term to describe the interference and conflict resulting from the location of the tunnel site and construction of the tunnel. As a matter of fact, this expression does not adequately describe such conflict. The term "right of way" is defined to be an easement or interest in land appurtenant to the dominant estate; "it is classed as an incorporeal hereditament lying in grant." In very many instances it consists merely of the privilege possessed by a third person of passing over the servient estate, and is used in common by the owner of that estate and its possessor.

As used in connection with the subject now under consideration, however, it is much more comprehensive. There is, of course, some interference with the surface in performing certain of the acts of location. The line of the tunnel has been defined to be a strip on the surface the width of the tunnel – usually about ten feet, (Corning Tunnel Co. v. Pell, 4 Colo. 508—see also Morrison's Mining Rights 9th ed. p. 195 et seq.); this strip must,

under land department regulations, be surveyed and plainly marked by stakes and monuments for the entire distance. But the main feature of the tunnel right of way is *the appropriation of territory for the bore of the tunnel;* this means *the absolute appropriation and exclusive enjoyment and use in the present case of a cubical strip of territory at least ten feet in height by ten feet in width, and 625 feet in length;* it carves out of the servient estate—the lode location—such large piece of ground and deprives the owner of that estate of the same and of all dominion thereover; and it may prove to be a very serious interference with the development of his property according to his own wishes and plans.

Thus the tunnel right constitutes a servitude and interest such as is equaled only by the most sweeping, exclusive and permanent rights of way recognized in the books; it is a conflict or interest involving the ownership and control of territory; it subtracts to an important extent from the fee conveyed by patent; it is a physical diminution of the territory covered by the lode location; in this respect it cannot be distinguished in principle from the physical interference with and taking away of territory by the successful contestor owning a conflicting surface lode location.

Moreover, as we will presently see by reference to the federal statutes, this kind of a conflict or adverse claim is of such a nature as to present not the slightest difficulty in the action or suit required to be brought in support of an adverse

claim; it is a present, tangible and certain interest; its nature, boundaries and extent are as easily described as are the nature, boundaries and extent of a conflict between surface mining locations; a mining engineer will encounter but little, if any, more difficulty in determining these matters in one instance than in the other; and it requires no argument to show that a jury will have no more trouble in determining the right to possession of such right of way than in determining the right to possession of a surface piece of territory covered by conflicting locations.

I challenge counsel to produce a single valid reason, based either upon principle or upon physical conditions, for denying the necessity of the tunnel owner's filing and litigating his adverse under circumstances like those in the case at bar. And I confidently assert and will endeavor to show, that both the federal statutes and the decisions are not only in perfect harmony with, but when properly understood fully sustain my contention in this regard.

III.

The Federal Statutes Recognize an Adverse for Tunnel Right of Way.

Tunnel locations are authorized by and derive their force and effect from Section 2323, Revised Statutes of the United States. This section reads, *inter alia:*

> "Where a tunnel is run for the development of a vein or lode or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; * * "

The fundamental purpose of this provision is to give the tunnel owner the blind veins discovered in the tunnel; but it has been made the basis of quite elaborate tunnel site location regulations, and quite a system of tunnel rights, obligations and limitations.

Your Honors have construed this section in conjunction with the preceding section, which relates to lode claims, and have recognized and applied the *principle of priority*, permeating the whole mining law, both national and state. That is to say, this court has held that it was the intention of Congress by this statutory provision to confer the benefits specified in conjunction with tunnel locations, only upon such tunnel locations as *are prior in time* to the conflicting lode locations. In the Ajax case above mentioned you declare that--

> "There is no implication of the displacement of surface locations made before the commencement of the tunnel. Indeed there is a necessary implication of their preservation. And there can be no implication of a conflict with the rights given by Section 2323. The exclusiveness of these rights we have declared. The

tunnel can only be run in subordination to them."

As to the correctness and meaning of this portion of the Ajax opinion there is no dispute in the present controversy.

But Section 2322 mentioned, makes a full, complete and exclusive grant of all veins having their tops or apexes within the boundaries of surface lode locations projected vertically downward, as well as to the country rock or adjacent territory within such boundaries. And the construction given by Your Honors declares, in effect, that *a junior tunnel locator acquires no rights whatever by virtue of Section 2323, in a senior lode location.* There is nothing in the statute or in the interpretation given by this court to the statute, that sanctions a trespass of any kind by the junior tunnel locator upon the senior lode location. *To acquire any rights whatever, and to avoid being a mere trespass,* the tunnel location must have been prior in time to the conflicting lode location. It is clear that by this provision Congress did not intend to confer upon *a junior tunnel locator a right of way through a senior lode location,* any more than that body intended to give blind veins to the tunnel owner under such circumstances.

That a tunnel location is a *mining claim* within the meaning of the law will not admit of dispute; it has been frequently held to be such. And involving as it does a right of way through lode locations lying across the line of the tunnel, it cannot

be doubted that the tunnel is an *adverse* mining claim.

The mining adverse statute (Section 2326) is as follows:

> "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same and shall show the nature, boundaries and extent of such adverse claim, and all proceedings except the publication and notice, and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. * * "

It will be noted that the "adverse claim" is not confined to a *surface* conflict. A surface conflict is nowhere in any manner alluded to. The language is "an adverse claim"; to say that such claim is limited to a surface conflict is to amend the statute; it is to read into the statute something that does not appear therein. The phrase "adverse claim" is broad enough to cover any claim that in any manner diminishes the applicant's ownership of or dominion over the territory applied for. Why should the courts amend the statute by placing a limitation thereon? When they have said that the

"adverse claim" must be "a present, tangible and certain right," I submit, they have gone far enough. But, as already declared and hereinafter more fully shown, the right of way of a senior tunnel location for the tunnel, fulfills in every respect this requirement. And when we consider the added fact that the conflicting tunnel claim is one that can be easily and fully determined in the adverse suit, there would seem to be no excuse for excluding this class of claims from the purview of the statute.

Inasmuch as counsel for respondent place some reliance thereon, (See printed brief pp. 7 and 8). I ought perhaps, in passing, to notice that portion of said Section 2326 which entitles the successful party in the adverse suit to file a certified copy of the judgment roll with the register and proceed to patent the territory previously in conflict.

That provision doubtless applies to those cases where the adversing plaintiff represents the kind of a mining location for which a patent is necessary to convey title. But no patent or other instrument is necessary to convey title to the territory covered by or included within the bore of the tunnel under a proper tunnel location; the statute itself so operates as to complete and perfect the exclusive right to possession of such territory, just as it does to complete and perfect the exclusive right to blind veins discovered in the tunnel; no other title is provided for in either case. A surface location of such blind veins is pronounced by this and other courts to be wholly unnecessary; Ellet v. Camp-

bell, 18 Colo. 521, 167, U. S. 119. To make a surface location of a blind vein so discovered, if it were possible, and proceed to patent thereon, would be procuring a patent to that which the patentee already owns by title substantially equal to a title in fee from the United States. It would be entirely useless for the successful tunnel contestant to avail himself if he could, of this patent entry provision of Section 2326. And I need hardly repeat to Your Honors that it is uniformly held that if the blind vein is discovered in the tunnel prior to patent proceedings, the tunnel owner *must* adverse or forfeit his interest therein.

I submit that the Federal Statutes will be searched in vain for anything inconsistent with the view that respondent should have filed its adverse and have litigated in the adverse suit the priority of its location. I respectfully urge that these statutes, when fairly and reasonably construed, imposed upon respondent the duty to do so.

IV.

Decisions in Harmony with the Foregoing Proposition.

Not only does the foregoing view harmonize perfectly with the federal statutes, but it is not inconsistent with any of the decisions save that of the Circuit Court of Appeals in the case at bar. The cases that refer to tunnel adverses are few, and I will briefly consider them.

So far back as 1881 the Commissioner of the General Land Office, in the Tioga-Bodie controversy, 8 Copps L. O. 88, held that a tunnel location was a mining claim, and sustained the necessity for an adverse, by the tunnel owner, of a conflicting lode claim patent application; although in that case no blind vein had at the date of such application been discovered in the tunnel.

Afterwards, upon appeal, the Secretary of the Interior held that a tunnel location is a "mining claim," and that if it conflicts with (i. e. intersects) a lode location, it is an "adverse claim" within the meaning of the statutes. And besides sustaining the necessity of filing an adverse he approves the holding of the Commissioner:

> "That it was necessary for the rights of the tunnel company that suit should have been brought in court as provided by Section 2326, Revised Statutes, and that as said company failed to institute such proceedings its adverse claim was waived, and that it cannot be adjudicated by this department."
>
> Bodie T. & M. Co. v. Bechtel C. Mg. Co. and Tioga C. M. Co., 1 L. D. 586, 587.

The opinion is well considered; the existence of tunnel rights, and the power, as well as the duty to vindicate those rights through the statutory adverse and adverse suit, are emphatically declared. And because of the failure to file the adverse or to prosecute the adverse suit, the learned Secretary declined to allow the Bodie

Company's request and make the grant to the lode claims under the patent, subject to the alleged claims of the tunnel company.

Again, the Secretary of the Interior, as late as 1899, upheld a tunnel adverse where the tunnel does not appear to have discovered any blind veins either in the conflicting lode claims sought to be patented, or beyond; the adverse claim being "to recover all that parcel of the Sangre de Christo Tunnel & Tunnel Site embraced within the lines of the survey of the Ella W. and Mary A. claims." *Inter alia*, the learned Secretary says:

> "A tunnel location under the laws of the United States is a mining claim and may be made the basis of an adverse claim. * * This being so, the filing of an adverse claim in the local office and the commencement of suit thereon in the District Court will operate as a stay of all proceedings upon Burton's application for patent until the controversy shall have been settled by a court of competent jurisdiction, or the adverse claim waived, unless the applicant for patent has excluded from his application the land covered by the adverse claimant, in which event he may take a patent for the remainder."
>
> Byron B. Burton 29 L. D. 235, 236.

The patent application in that case was filed in 1894; afterwards and in 1898, in the "application to purchase," the line of the tunnel and a portion of the "tunnel site" were expressly excluded; but as a certain tract "for dumping purposes," was included in the original adverse claim, the learned Secre-

tary declined to allow the patent entry till this claim was adjudicated in the pending adverse suit. Such adverse suit is still undetermined.

In Back v. Sierra Nevada C. M. Co., 2 Idaho 386, the court is discussing this subject under similar conditions; that is to say, where no vein has been discovered in the tunnel, and at the time of patent application the tunnel owner does not appear to be the owner of a vein or lode beyond the conflict territory, which the tunnel is run to develop. In the progress of such discussion, the court, at page 391, says:

> "The rights of the tunnel locator being created by statutory enactment, the courts should be, therefore clothed with power to protect such rights, and we are unable to see how they can be fully protected but by permitting such locator to avail himself of the provisions of Section 2326. Doubtless it was the legislative will that he should have such privilege. Such being the case, we must hold that a tunnel location constitutes a mining claim within the meaning of the statute, as was held by Commissioner Kirkwood. * * And that it is such a claim as may be asserted and protected under the provisions of Section 2326 Rev. St. U. S. and the act amendatory thereof. While this appellant would have no right under his complaint *to have a patent issued to him*, since he *does not claim to have discovered any vein or lode*, yet we think he has the right of possession for prospecting purposes to the area in dispute and to show that respondent's location was made upon the line of his tunnel."

In Hope Mining Co. v. Brown, 11 Montana 370, the bore of the tunnel under consideration had not reached the territory of the lode claim applicant for patent, yet since the lode claim intersected the line of the tunnel, the court recognized the necessity for an adverse, and sustained the same.

I only refer to this case, however, on the general proposition that a tunnel location should adverse. The ruling is put by the court upon what in my judgment is an incorrect basis. The ownership of a right of way for the tunnel is not considered either by court or counsel. The decision rests upon the fact that the intersecting lode claimant has found a blind vein in his territory that will probably be cut in the tunnel when the bore thereof has been sufficiently advanced. In the light of those decisions holding that it is not necessary to adverse for blind veins that may not exist or may never be cut (discovered?) in the tunnel, this specific ground was not sufficient alone to sustain the adverse suit; or to justify the granting of the temporary injunction therein against the patent proceeding. Had the opinion rested upon the *necessity to adverse for the tunnel right of way, and the trial of the adverse suit been ordered to proceed at once*, it would, I think, have been impregnable.

The case of Corning T. Co. v. Pell, 4 Colo. 507, which is sometimes referred to as inconsistent with the theory that the tunnel locator should ad-

verse the conflicting lode claim application for patent, is, for a number of reasons, not pertinent to the present inquiry. The subject of the tunnel right of way was not there considered. The court held that the "line of the tunnel" was a strip ten feet wide; that a lode "location" is simply the discovery shaft; and that since the Slide discovery shaft was not within the ten foot strip constituting the line of the Corning tunnel, there was no conflict and the adverse proceeding must fail. In view of the more modern decisions of this and other courts, including the Supreme Court of Colorado itself, comment upon the Corning case in unnecessary.

I do not comment upon the case of Glacier Mining Company v. Willis, 127 U. S. 471, which holds that ejectment may be maintained for the veins and territory included within a prior tunnel site location; my reason for not doing so is that the tunnel site location there under consideration and the rights obtained through such location were based solely upon mining rules and regulations; no act of congress, not even that of 1866, on the subject of mining rights having been adopted at the date of said location.

The case of Ellet v. Campbell, 18 Colo. 510, and 167 U. S. 119 is perfectly consistent with the view I am advocating. Those decisions simply hold that a senior tunnel location owner who has discovered a blind vein in the tunnel should adverse a junior lode claim application for patent,

the location of which is based upon a subsequent discovery of the same vein from the surface. No attention is given, in fact *no attention is necessary* under the circumstances, to the question the *right of way*. The prior location of the tunnel, and the prior discovery therein of the blind vein, were amply sufficient *alone* to sustain the adverse suit. The case is, however, authority for the necessity of filing an adverse under such circumstances, and where *no surface location of the blind vein is made.*

I come lastly to the Enterprise-Rico-Aspen case, 66 Fed. 200 and 167 U. S. 108. This case is the main reliance of counsel for respondent in discussing the subject of tunnel adverses. At page 12 of the printed brief filed in the Circuit Court of Appeals, they say, referring to it,—"This, so far as we are able to find, is the only authority in the Federal Courts upon the question relative to tunnel site claimants and lode claimants in respect to adverse proceedings." They then quote elaborately from the opinion and undertake to apply the conclusion reached to the case at bar. And, basing their question upon a supposed similarity between the two cases, they ask—"What right was possessed by plaintiff in error (the tunnel owner) in this case, at the time of the application for patent by defendant in error (the lode claimant), which would have entitled it to institute an adverse proceeding?"

The answer to this question is self-evident even upon a superficial reading of the Rico-Aspen case. Upon this vital point there is a radical dis-

tinction between the two cases. This difference I will try to make so plain by a reference to the facts and conclusions announced, that any extended comment will be superfluous.

The Rico Aspen case holds it to be the duty of the senior tunnel owner to present in connection with the lode application for patent, and litigate, his adverse claim to a blind vein already discovered in the tunnel. But it further holds that if no such blind vein has been discovered, the tunnel owner need not adverse the patent application; (*his reliance was based alone upon his right to blind veins*). The Circuit Court of Appeals, at page 209, says, among other things:

> "The law does not require an impossibility of any man, it does not require him to know the unknown, or to demonstrate that which is incapable of proof; and we are of the opinion that the owners of this tunnel ought not to be and were not estopped from enforcing the rights guaranteed to them by the Act of Congress because they did not make and maintain their claim to those rights at a time when it was impossible for them to establish them and when no one knew that they existed."

But in that case—unlike the case at bar—the Vestal claim referred to, *did not intersect the line of the tunnel; it was parallel to the tunnel and 500 feet distant therefrom; and the tunnel, no matter how far projected, would never have conflicted with or passed into the territory of the lode claimant;* therefore the

subject of a *right of way through the lode claim was not and could not have been involved.* There was not, and could never be, any conflict of territory; either from the location and staking of the tunnel line on the surface, or from the extension of the bore of the tunnel through the Vestal claim, below the surface. But the court does say:

> "There is no doubt that the object of these provisions (adverse sections) of the act of Congress is to require the conflicting claims *of all parties* to be adjusted before the patent issues, *so far as that can justly be done at the time the application for patent is made.*"

This language is too plain to be misunderstood and I submit that had the Vestal claim *intersected the line of the tunnel*, and had the subject of the *tunnel right of way* through such claim *been presented*, the court would have reached a different conclusion as to the necessity for an adverse. It would no longer be the case of requiring a man "to know the unknown, or to demonstrate that which is incapable of proof;" it would be the case of requiring him to comply with the statute by presenting *a well known and substantial adverse claim* and demonstrating by proof *its present, certain existence.* I submit that it would be a case where all such questions as the date of the discovery of mineral could "justly be presented at the time the application for patent is made."

But the Rico-Aspen decision, upon which I have just been commenting, was reviewed by this

Honorable Court. That decision was here affirmed. In the course of the affirming opinion, written by Mr. Justice Brewer, and at page 115 of the report, (167 U. S.) I find the following language:

> "Now at the time the application for patent to the Vestal claim was presented and proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be perceived, *runs parallel to the line of the tunnel and is distant therefrom some five hundred feet.* The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located, and such a vein would not, unless it radically changed its course, *cross the line of the tunnel.* Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal *was a matter of pure speculation* and there would be no propriety in maintaining a suit to establish defendant's inchoate right and delay the Vestal claimants in securing a patent on a mere possibility *which might never ripen into a fact.*"

The above italics, as well as the italics in other quotations made in this brief, are mine.

Why does this Honorable Court emphasize, by a specific reference thereto, the facts that the Vestal claim lay parallel to the line of the tunnel five hundred feet away, that the Vestal vein or veins unless they changed their course would never cross the line of the tunnel, and that whether any

vein to be found in the tunnel would cross the Vestal claim was a matter of pure speculation? The plain inference, it seems to me, is, that if the tunnel line had intersected the Vestal claim, the conclusion might have been different. This court might, in such case, of its own motion, have recognized the conflict of territory occasioned by the tunnel line on the surface and by its bore below the surface; even though counsel might have limited their argument to the discovery of blind veins. The very language employed by this court lays especial stress upon the fact, as did the language of the Court of Appeals, that the question of a right of way for the tunnel was not and *could not have been presented* or considered. The *tunnel claim solely relied upon* in that case was the subsequent possible discovery of a vein which, changing its presumptive course and after leaving the territory of the Vestal claim, might intersect the line of the tunnel and be (discovered) found therein.

But Your Honors clearly, it seems to me, sanction my position touching the necessity for an adverse in cases like the present, when you employ the following language, beginning at the bottom of page 115 of the report:

> "The obvious contemplation of the law in respect to these adverse proceedings is that there shall be *a present, tangible and certain right, and not a mere possibility.*"

If these words mean anything—and Your

Honors would not use meaningless language—they mean that if the tunnel owner, through his tunnel location, acquired "a present, tangible and certain right" in the lode claim that is proceeding to patent, he must file his adverse and set up and have adjudicated such right. But a right of way for his tunnel, including as we have seen the absolute appropriation of and exclusive dominion over a strip of land in the lode claim from ten to twelve feet in height and width and hundreds of feet in length, is a present and surely a most tangible and certain right; it is, as already observed, such an interest or claim as can readily be presented and adjudicated in the adverse suit. I submit there is no difference in principle, so far as this question is concerned, between the ownership of such a tract of territory below the surface and of a piece of ground of equal area upon the surface. It is just as important and desirable to have such a conflict below the surface adjudicated prior to patent as it is to have the surface controversy so determined.

These observations apply with equal force to certain language employed by the Court of Appeals in deciding the case at bar. The learned judge who wrote the opinion, referring to the facts shown in this case, at page 167—119 Federal—says:

> "It (respondent) was neither acquired to become such a party (to adverse proceedings) nor to submit its claims and interests in the lands to the adjudication of that department at that time, because its rights

> therein were then too uncertain, contingent and intangible to admit of determination. When the applications for the patents for the lode claims were filed, the blind veins which have induced the use of the tunnel through the lands in controversy, had not been discovered, the tunnel had not been driven into the land, and it was impossible to know whether or not the claimant of the tunnel site would ever acquire a right to use the land for the purpose to which it is now devoted. The claimant of a tunnel site is not required by Sections 2325 and 2326, Rev. St. * * to file an adverse claim and submit his rights in the lode claims it crosses to adjudication by the Land Department upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent and intangible. * * It (respondent) was not required to file an adverse claim and to submit its rights to the adjudication of that department when applications for the patents were made."

No one can read this language and not be impressed with the facts: First that the court was not contemplating or considering the question of the appropriation of a tract of territory for the bore of the tunnel; and, second, that if it had been contemplating this question it would not have said that respondent was not required to file an adverse claim; it could not have declared such a right and interest to be "too uncertain, contingent and intangible for determination." A careful examination of that opinion will show that, throughout, the

attention of the court is directed *solely to the discovery of blind veins;* and that the specific proposition I am here urging was entirely overlooked by that august tribunal.

Mr. Morrison, in the 9th edition of his valuable work on mining rights, beginning at page 195, deals with the subject of tunnel sites and considers the cases bearing thereon. Upon this specific branch of the subject, at page 202, he says:

> "The Land Office in the decision above cited held that a tunnel *must* adverse to protect its tunnel rights; but we apprehend that a patent granted across the line of the tunnel would not effect the rights of such tunnel so far as its easement of right of passage is concerned."

The fact, however, that Mr. Morrison's mind is unsettled, and that he regards the subject *as an open question* under the decisions, is shown by the sentence he employs immediately following the above quotation. He says;

> "But it is safer to either adverse or procure a deed from the applicant for the right or territory clouded by the application."

I am aware of the fact that Mr. Lindley, at Section 730 of his work on mines, under the head "Underground Conflicts," says:

> "An application for patent invites only such contests as effect the surface area. A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such

> a condition arises it is adjusted by reference to surface apex ownership and priority of location not involving any surface conflict. The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts or questions involving extralateral rights are not the subject of adverse claims."

This language, by such a distinguished writer cannot be lightly treated. Were it not for circumstances which appear in the text and foot notes, the statement would be entitled to serious weight.

But in the first place, we must consider that Mr. Lindley is simply stating the construction of the adverse statute so far as interpreted by the decisions at the time the paragraph was written. He is not attempting himself to give a complete interpretation to this statute, nor to express his personal view as to its scope or effect. Moreover, Mr. Lindley is discussing the subject solely with reference to lode claims. His mind, as shown by the language used is directed to a certain class of underground conflicts, viz: The *intersection and union of veins on their dip*—a class of conflicts or conditions that has thus far only challenged attention in connection with surface lode locations; and as to which *the Federal Statute itself (Sec. 2322) expressly legislates*, by declaring that the ore at the point of intersection or below the point of union of such veins shall belong to the senior location; thus giving express statutory sanction to the view adopted by the

courts that as to this specific class of territorial conflicts no adverse is required.

As is clearly demonstrated by his discussion and by the authorities cited, Mr. Lindley was not there considering and did not dream of considering the point I am now urging upon the attention of Your Honors. At Section 490a he does refer, however, to the subject of a right of way for tunnels through lode locations. And he emphatically announces and endorses the proposition that a junior tunnel locator is not entitled thereto through a senior lode location; that the law, including the decisions, *does not recognize any such privilege, and that a state statute attempting to confer the same would be unconstitutional and void.*

So I say, without fear of successful contradiction, that said Section 730, notwithstanding its unqualified language, was not intended to cover the subject now under discussion; and that it cannot be regarded as an expression either of Mr. Lindley's private views thereon, or as a statement by him of judicial rulings with reference thereto.

Respectfully submitted,

J. C. HELM,

Amicus Curiæ.

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SUPREME COURT U

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 18.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
Attorneys for Petitioner.

THE SMITH-BROOKS PTG. CO., DENVER.

n the Supreme Court of the United States.

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HE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

HE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

Certorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

Comes now the petitioner above named and respectfully presents its petition for a rehearing in the above entitled cause, and by which the petitioner prays that the judgment of this Honorable Court, rendered on the 30th day of January, A. D. 1905, may be wholly set aside, and a new and different judgment entered therein in favor of said petitioner, and your petitioner respectfully shows that the opinion and judgment of said court was erroneous in the following particulars, to wit:

1. The said court erred in that part of its opinion where it stated the law in regard to mines and mining claims to be as follows:

"Was there error in striking out these defenses? By section 2319, R. S., 'all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase.' Until, therefore, the title to the land passes from the government the minerals therein are 'free and open to exploration and purchase.' A lode locator acquires a vested property right by virtue of his location (Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 220), but what is the extent of that property right? Section 2322 defines it as follows: 'The locators * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' The express grant made to the locator by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the government the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the government."

2. The court erred in its opinion in said cause in holding that a patent did not relate back to the filing of the location certificate in the office of the county clerk and recorder as required by the federal and state laws, it being shown by the record in this cause and by the pleadings, so far as the relative priority of the tunnel and lode claims are concerned, that the lode claims were prior in point of time to the tunnel claim.

3. The court erred in declaring the law to be that the tunnel claimant need not adverse a lode claim where there was an actual conflict between the lode claim and the tunnel claim.

4. The court erred in failing to take notice of the fact that in the record in said cause it appears that the tunnel claim is void for the reason that it never complied with the law.

For these reasons this petitioner respectfully prays that this court will set aside the opinion which it has already filed in said cause, and grant to this petitioner a rehearing, and we submit herewith a brief setting forth the reasons and authorities why this petition should be granted.

Respectfully submitted,

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
Attorneys for Petitioner.

We hereby certify that the foregoing petition is in our opinion well founded, and is not made for the purpose of delay.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT.

The following mining companies and mine owners join the petitioner in a request for the rehearing, because of the obvious and serious menace of the opinion to the mining industry of the United States:

Butte, Montana—

Anaconda Copper Mining Company,
By John Gillie, Gen'l Supt. of Mines.

Butte & Boston Consolidated M'g Co.,
By John Gillie, Supt.

Parrot Silver & Copper Co.,
By N. A. Gallwer, Gen'l Mgr.

Boston & Montana C. C. & S. M. Co.,
C. M. Goodale, Manager.

The Colorado S. & Mg. Co.,
By Jas. B. Gallaher, Mgr.

Washoe Copper Co.,
By John Gillie, Gen'l Supt. of Mines.

Bull Frog, Nevada—

A. G. Cushman,
Prest. Montana Bull Frog Mng. Co.
Prest. Amethyst Bull Frog Mng. Co.
Prest. Paymaster Mining Co.

Bull Frog Annex Mining Co.,
By A. K. Wheeler, Sec'y.

Bull Frog Consolidated Mines Co.,
By A. K. Wheeler, Sec'y.

Cripple Creek, Colorado—

The Portland Gold Mining Co.,
By Irving Howbert, Prest.

The Anchoria Leland M. & M. Co.,
By C. W. Howbert, Vice-President.

The El Paso Consolidated Gold Mining Company,
By S. S. Bernard, President; J. M. Jordan, Secretary.

The Cripple Creek Consolidated Mining Co.,
By J. F. Humphrey, President.

The Agnes Gold Mining Company,
By F. H. Dunnington, Sec'y.

The Golden Eagle Mines,
By F. H. Dunnington, Sec'y.

The Maria A. Gold Mining Company,
By F. H. Dunnington.

The Acacia Gold Mining Co.,
By K. McKenzie, Vice-President.

The Midget Gold Mining Company,
By Frank G. Peck, Vice-President.

The Montreal Gold M. & M. Co.,
By Frank G. Peck, Secretary.

The Gold Hill Bonanza M. Co.,
By Irving Howbert, Prest.

Chas. S. Keafer.

James J. Cone.

The Strong Gold Mining Co.,
By Wm. Lennox, President.

The Katinka Gold Mining Co.,
By Wm. Lennox, President.

The Gold King Mining Co.,
By E. A. Colburn, President.

The Ajax Gold Mining Co.,
By E. A. Colburn, President.

Ouray, Colorado—

Camp Bird, Limited,
By W. J. Cox, Gen. Mgr.

Creede, Colorado—

Jesse H. Lewis.

A. M. Collins.

Silas Frank.

A. D. Parsons.

E. Stone.

G. A. Pettitt.

A. W. Derrick.

H. C. L. Bower.

W. C. Sloan.

Wm. Stone.

J. F. Biles.

N. H. Slaght.

C. W. Stump.

Theo. A. Wheeler.

M. J. Moses.

The Creede United Mines Company,
By Wm. P. Malburn, Sec'y.

The Humphreys Tunnel & Mining Company,
By Geo. Davis, President.

The Big Kanawha Leasing Co.,
By Geo. Davis, President.

The Florodora Mining Company,
By Geo. Davis, Treas.

The Del Monte Leasing Co.,
By A. E. Humphreys, President.

Leadville, Colorado—

Jas. A. Shinn.

The Evalyn Mining & Leasing Co.,
By Wm. P. Malburn, Sec'y.

Joseph Golob.

Central City, Colorado—

Lyne S. Newell, Jr.

Pleasant Valley Mining & Milling Co.,
By R. W. Cokell, Sec'y.

Bi-Metallic M. & M. Co.,
By R. L. Martin, President.

The King Bee G. M. Co.,
By R. W. Cokell, Sec'y.

Samuel A. Rank.

Gregory-Buell Cons. G. M. & M. Co.,
By R. L. Martin, Manager.

Idaho Springs, Colorado—

E. D. Quigley.

The Stanley Mines Co.,
By A. G. Brownlee, Prest.

Garfield, Colorado—

Joseph G. Marriott.

Silverton, Colorado—

The Quartz M. & M. Co.,
By M. B. Holt, Prest.

Cupurite, Nevada—

John T. Murphy,
Owner in The Jasper Claim.

J. H. Platner.

Diamondfield, Nevada—

Charles A. O'Connell,
Manager New York Group.

Goldfield, Nevada—

James F. O'Brien,
Pres. Cache Gold M. Co.
Vice-President Empire Mng. Co.

A. J. McDarmel.

Hanley T. Allyn.

L. De Sallier.

Pullen & Beardsley.

W. T. Liggett,
Pres. Goldfield Combination M. Co.

G. W. Thatcher.

Scott E. Jameson,
Director Goldfield Apex Co.
Sec'y Goldfield Bull Frog Dev'l. Co.

R. C. Kanters,
Supt. and Director Copperfield Mines Co.

J. B. Harris,
Of Copper King Mines.

B. J. Reilly,
President of Hibernia Goldfield Mng. Co.

M. H. Jones.

Associated Mining & Development Co.,
By H. R. Bacon, Consulting Engineer.

P. H. McLaughlin,
Prest. Goldfield Lucky Strike Mng. Co.

F. A. Butler, Jr.,
Owner of the Hungry and Rainy Day Claims.

W. S. Williams,
Wonder Goldfield Mng. Co.
Sec'y Goldfield Bull Frog Mng. Co.

Thos. Ramsey,
Sec'y Berkeley Goldfield Mng. Co.

Tonopah, Nevada—

The Tonopah Mg. Co. of Nevada,
By F. A. Keith, Gen. Mgr.

Malcolm L. MacDonald, General Manager.

Southwestern Nevada Mines Co.

Goldfield Simmerone Mg. Co., Goldfield, Nev.

Goldred Mines Co., Goldfield, Nev.

Montana Tonopah Mg. Co.,
By D. B. Gillies, Mgr.

North Star Tunnel & Mg. Co.,
Frank Golden, Prest.

J. P. Brissell, Secretary of Ray Consolidated M. Co., Columbia Mountain M. Co., North Tonopah M. Co.

Tonopah Extension M. Co.

Golden Anchor Mining Co.

Red Rock Cons. M. Co.

Pittsburg-Tonopah M. Co.

Has Brouck M. Co.

Goldfield-Highland M. Co.,
By John McKane, Gen'l Mgr.

W. H. O'Neil.

Jas. G. Ford.

Jno. T. Wheeler.

E. R. Shields.

Elton Davis, D. D. S.

Star & Dulfer, by F. W. Dulfer.

L. H. Conley & Co.

H. Fletcher.

J. K. Chambers.

Jas. H. Atkin.

T. B. Weir.

F. Taylor.

H. W. Schell.

Bullfrog M. Co.,
By H. H. Clark, Mgr.

Kenneth M. Jackson.

Midway Mining Company,
By H. C. Brougher, Prest.

W. J. Douglas.

M. S. Bonnifield, ex-Justice Supreme Court, Nevada.

Goldfield, Nevada—

Alden H. Burns.

D. F. Sullivan.

Tonopah-Goldfield Trust Co.,
By W. D. Lawton, Prest.

Nevada Exp. Co.,
By W. O. Thompson, Vice-Prest.

J. W. Palmer & Co.

Goldfield Cons. M. Co.,
By Alfred G. Winter, Prest.

J. C. Denton.

John Beckmans.

Thos C. Dobbins.

G. A. Griffin.

L. E. Wilson.

G. M. Smith.

C. A. Richards.

Wm. Maxwell.

H. T. Bragdon.

P. M. Bowles, Jr.

D. H. Kehoe.

Patlach M. & M. Co.,
By Marshall Bond, Prest.

Goldfield Consolidated M. Co.,
By Jas. R. Boal, Treas.

Gold Hill Mining Co.,
By H. W. Knickerbocker, Prest.

J. & R. Ridge.

Nevada Mining & Exp. Co.

Black Butte Goldfield M. Co.

Bullfrog Nat'l Bank M. Co.

Bullfrog Crown Point M. Co.

Elkhorn Gold M. Co.

Goldfield Mascot M. Co.

Forward Mining & Dev. Co.

Yankee Girl G. M. Co. of Bullfrog,
By L. L. Patrick, Prest.

The Golden Sun M. & M. Co.,
By Edgar T. Butler, Prest.
Gold Horn M. Co.
Tonopah Belcher M. Co.
Goldfield Columbia M. Co.
Esmeralda Placer Co.,
By F. M. Lathrop, Prest.

Bullfrog, Nevada—
G. G. Davis.
Wm. Ladlee.
D. P. Beebe.
Frederick Wiggins.

Tule Canon, Nevada—
G. G. Rice.

Desert District, Nevada—
Nevada Southern S. G. & S. M. Co.,
By Frank P. Davis.

Sodaville, Nevada—
A. I. D'Arcy.

Ray, Nevada—
Arthur Kunze.
I. W. Skelton.

Beatty Mining District, Nevada—
Nevada Bullfrog Mines Co.,
By C. S. Wilson, Sec'y and Att'y.
C. O. Neckes.

Casa Grande, Arizona Territory—
C. M. D'Arcy.

Park City, Utah, and Lead, South Dakota—
Samuel McLachen.

FILE COPY.

In the Supreme Court of the United States.

October Term, A. D. 1904.

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SUPREME COURT U.S.

No 18.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, Petitioner,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Respondent.

Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF ON APPLICATION FOR REHEARING.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
Attorneys for Petitioner.

THE SMITH-BROOKS PRESS, DENVER

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Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF ON APPLICATION FOR REHEARING.

The petitioner has filed in this case an application for a rehearing. We confess that were it not for the fact that the issues involved are momentous to the mining industry in general, we would not presume to trouble this court any further with this controversy. It has been argued orally twice, the court

has had the benefit of elaborate printed briefs and know that all the justices have given to every phase of the case patient and careful consideration. We know that the opinion already rendered was arrived at as the result of extensive and painstaking investigation on the part of the members of the court, and recognizing that the time of this tribunal ought not to be taken up with petitions that only endeavor to reopen some old phase of the same argument, we have abstained until this time from filing and pressing this petition. But the more the decision of the court has come to be understood by the mining community in general, the more far reaching it has been found to be, and the more convinced are we that it has overthrown so many settled principles of mining law, has thrown such doubt on the sanctity of mining patents as to render insecure thousands of mining titles and threatens in many aspects the very existence of mining itself in many localities. So tremendous, indeed, seems to be the effect of the decision that we believe this court will once more consider the questions involved, and we are satisfied that if it will but do so, it will frankly acknowledge any mistakes made in the decision and withdraw the same. It is in this belief and for these reasons that we have filed and now propose to urge our petition for a rehearing.

Since the inception of mining in the Western states and territories, every officer of the land department, who has had anything to do with the administration of the land laws, has come to regard the tunnel section with suspicion as carrying within it principles which might some day be invoked to the great detriment of mining. Every text writer who has written upon the subject has reached this same conclusion.

The courts of the mining states early settled into this belief, but in construing the law they have announced rules which have prevented tunnels so far from becoming an active menace to the mining industry. It has remained for this court in this case to announce principles which have removed all barriers heretofore erected, and gives the statute a construction that will enable all the fears of the land department, the courts of the mining states and the text writers to be realized. In the opinion promulgated in this case, the court has held: (1) That a valid location, before the owner applies for patent only gives the locator title to the surface, and leaves the ground underneath the surface open for exploration and discovery; (2) that when a patent has been obtained it does not relate back to the inception of the record title of the locator, but only to his application for patent; and (3) that the owners of a tunnel running through a lode claim do not have to adverse the application for patent made by the lode claimant. These three propositions are so fundamentally opposed not only to the previous decisions of this court, but to the well recognized understanding of the mining statutes by the mining states in general that they seem revolutionary and if persisted in mean such an unsettling of mining titles as will result in the withdrawal of capital from that business and in the crippling of the industry to an extent that can not be calculated.

To show the court the general position which the officials of the land department and the text writers have taken in regard to tunnel claims, we call attention to the following citations; Mr. Rossiter W. Raymond served for several years as special commissioner for the treasury department in investigating

conditions of the mining industry in the Western states, and made several reports concerning the same. In a report made to the secretary of the treasury, which was submitted to Congress on the 16th day of March, 1871, Mr. Raymond referred to tunnels generally. This report was printed under the head of "Mineral Resources West of the Rocky Mountains, 1871." On page 323 we find the following language:

> "The sale of 'tunnel claims' at exhorbitant prices, as if they were in themselves valuable property, is reprehensible. A tunnel claim may be a valuable auxiliary to the owners of the veins which can be drained by it. In and of itself it is the privilege of spending money to cut veins which may belong to other people. As far as blind lodes are concerned, the tunnel claim does, indeed, give so many feet upon each vein discovered by the tunnel; but surface explorations would discover many more veins at the same cost than a tunnel will cut; because the surface prospector can go where he likes to look for outcrops, while the tunnel must hold a single course. It is almost as absurd to run a cross-tunnel after blind lodes as it would be to sink a shaft at haphazard in dead rock. The rights attached to a tunnel claim unaccompanied by surface ownership of known lodes to be pierced, are extremely visionary. The only tunnel right which would be really valuable our laws do not give. I mean the right to exact royalty from mines benefited by the tunnel. This has been granted by

contracts and confirmed by legislation in the case of the Sutro Tunnel in Nevada, an enterprise which, I need hardly say, as it is connected with the largest, deepest and most productive mines in the country, does not belong in the category I am now discussing. The tunnel royalty was, in Europe, for centuries the privilege of every one who should drive a tunnel not less than thirty feet deeper than any preceding one, so as to benefit an overlying mine. I do not say it would be wise to make this provision generally applicable to our mines; but this I do say, that in the absence of some tangible source of revenue, deep cross-cut tunnels, under-running only undeveloped or unknown lodes, or lodes belonging to other owners, are gratuitous folly."

The same distinguished authority a few years later wrote an article construing Section 2323 of the revised statutes, in which, after quoting the section, he says:

"This is the only provision in the revised statutes concerning tunnel rights. Perhaps it is fortunate that there are no more. Certainly this one is ambiguous and perplexing enough, and additional ones of the same character would have made confusion worse confounded.

"In attempting to discuss this provision and to set forth its interpretation by the courts, I am led at the outset to point out

the historic cause of its fundamental defect —a cause which underlies also many other defects of the act of 1872.

"The customs of miners and the act of 1866 recognized, as the foundation of mining title, the priority of discovery. The act of 1872, intended to remedy certain evils developed in the administration of the act of 1866, comprised various provisions for that purpose (provisions, that is to say, which assumed the principle of the former act, and only modified its application) and also provisions of a totally different character, creating the new principle of apex-rights, and thereby nullifying the customary rights attached to discovery pure and simple. The act containing this revolutionary innovation was never carefully harmonized throughout, in accordance with the new principle thus established, and presents many features really intended to be parts of the old discovery-law (so to speak) and not framed to be parts of the new apex-law. This tunnel section is one of these anachronisms. As an amendment to the act of 1866, it is, taken by itself, simple and clear enough, though perhaps not wise. As a part of the act of 1872, it is inconsistent, incomplete and mischievous."

6 Mineral Industry, 681.

We trust the court will read this entire article, and for the purpose of getting it to do so, we print it as an appendix to this brief.

This later article of Mr. Raymond's was written in 1897. The land office early discovered the tendency of section 2323 as shown in the rules and regulations adopted relating to mineral lands. Rule 26 reads as follows:

> "26. Tunnel not Worked. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purpose named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels to the detriment of the mining interests and to the exclusion of bona fide prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a reasonable diligence on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all discovered veins on the line of such tunnel."
>
> Morrison's Mining Rights, page 310, 9th Ed.

We copy this rule from the rules issued December 1, 1891, and which were in force at the time the rights in controversy in this action were acquired.

The position of text writers upon the subject may be gathered from Mr. Lindley's work on Mines, section 467. Mr. Lindley endorses all that Mr. Raymond

says, and adds some views of his own along the same lines.

Mr. Morrison reaches practically the same conclusion in his book of Mining Rights. We quote from page 230 of the 11th edition of his work:

> "The right to tunnel has been exercised since lode mining began on the Pacific coast. Such claims are frequently mentioned in the district rules and were recognized by Colorado statute as early as 1861.
>
> "The trespass of a tunnel cutting through country rock across a claim at great depth is not of that class denominated as destructive or irreparable, but it opens a private back door to the miner's underground wealth.
>
> "And applying the theory that every surface claimant owns to the center of the earth, no man has a right to drive a tunnel underneath the property of another without his license or consent.
>
> "Such right was constantly exercised without much question and it had been expressly held that it might be asserted under district rules. Bliss vs. Kingdom, 15 M. R., 239.
>
> "But especially since the sweeping demands of tunnel sites after the Rico-Aspen decision, compelled miners in self-protection to check their encroachments, any implied license to penetrate under previous locations or patents without grant or permit has been

> expressly denied. The decisions to this effect have been uniform, and they have been followed by the National Supreme Court. Richards vs. Dower, 64 Cal., 62; 73 Cal., 477; Amador Co. vs. Dewitt, 73 Cal., 482; Calhoun Co. vs. Ajax Co., 182 U. S., 499."

It is needless to say that Mr. Morrison's conclusions as to the effect of the decisions of this court are erroneous if the opinion in this case is to prevail.

The distinguished jurist who wrote the opinion in the case at bar uses the following language in a cause decided at the last term of this court:

> "Many regulations of the land department and decisions of courts found their warrants in an effort to so adjust various statutory provisions as to carry out what was believed to be the intent of congress, and at the same time secure justice to miners and those engaged in exploring for mines."
>
> Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 220.

We may safely say that all of the decisions of this tribunal down to the present time have endeavored to carry out this idea of Mr. Justice Brewer, and if some of the cases have resulted in hampering in any way the mining industry it is because such decisions were made necessary by the letter of the law. But the case at bar is one that will result in injustice to miners and those engaged in exploring for mines; will retard the development of the mineral domain and frighten all capital invested in the mining industry, and yet

it is one that is not called for by the letter of the law, and is opposed to the entire current of the previous decisions of this court. Instead of carrying out the settled policy of the government to restrict tunnel claimants to the letter of the law, it reverses this entire policy, and gives the tunnel claimant rights never contemplated by congress and affords him undue and unfair advantage upon the mineral domain of the United States.

Bearing in mind these views in general relating to tunnels, we will take up the points which we desire to present on this petition for a rehearing.

I.

We believe the court erred in the following portion of its decision:

> "Was there error in striking out these defenses? By section 2319, R. S., 'all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase.' Until, therefore, the title to the land passes from the government the minerals therein are 'free and open to exploration and purchase.' A lode locator acquires a vested property right by virtue of his location (Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 220), but what is the extent of that property right? Section 2322 defines is as follows: 'The locators * * * shall have the exclusive right of possession and enjoyment of all the sur-

face included within the lines of their locations, and all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' *So that the vested property right of the locator is limited to the surface and the veins apexing within its boundaries. Undoubtedly, therefore, until the entry of the plaintiff's lode claims, and possibly until the issue of the patent, the defendant had the right to drive its tunnel through the subsurface of the plaintiff's lode claims. That ground still remained the property of the government and was 'free and open to exploration.'*"

The lines in italics have since been modified by the court to read as follows:

"The express grant to the locator made by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the government the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the government."

But the legal effort of the entire passage we think remains the same as though the language first used had stood as the opinion of the court. A distinction is attempted to be drawn between the right of a perfect location before and after patent. Is there the slightest warrant for such a distinction in the statute or in any previous decision of this court? Does not a perfect location give to the owner the same title that a patent confers so far as possessory rights are concerned? This court has always said so down to the time it used the above language.

The court in the above quotation sites the case of Clipper M. Co. vs. Eli M. & L. Co., supra. We were counsel for the plaintiff in error in that case. We argued in our printed briefs and orally before the court that the title to an unpatented placer claim was in the government of the United States, and was free and open to exploration by persons claiming under a higher title; that is to say all persons looking for lode claims. It was acknowledged by both parties to that litigation that a perfect lode location gave to the locator the absolute right to the possession not only of the surface, but of all portions of the claim included within the lines thereof to the center of the earth. The distinction sought to be made was that a placer claimant did not have such rights, we insisting that so long as the placer claim was not patented a prospector had the right to go within its limits, discover and locate a lode if any should be found therein. But the court refused to take our view of the law, and held that an unpatented placer was of the same dignity as an unpatented lode claim, and stated in express terms that an unpatented lode claim gave to the lo-

cator the exclusive right to all of the ground included within the lines of his location, not only the surface, but everything beneath the surface. We quote the following from the language of Mr. Justice Brewer in that case:

> "Nor is this 'exclusive right of enjoyment and possession' limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' *In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground becomes subject to an exclusive right of possession and enjoyment by the locator.* And this exclusive right of possession and enjoyment continues during the entire life of the location, or in the words of Chief Justice Waite, just quoted, while there is a 'valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States.' There is no provision for, no suggestion of a prior termination thereof."
>
> Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 227.

But we now find the court, in the case at bar, not only adopting but extending the rule which we contended for in that case so as to hold that even

a lode claimant who has not secured a patent has only a right to the surface and the veins beneath the surface apexing within the limits of the claim, and all the balance of his ground is "free and open to exploration." Any one can go beneath the surface of the claim and explore it to the same extent as though the location had never been made. This is a novel doctrine to the mining world. It was unnecessary to a decision of the case, and is neither warranted by the statute nor by any previous decision of this court. The language of the statute is:

> "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines of such surface locations."

The court construes the last part of the quoted language as a limitation upon the first. In other words, it limits the exclusive possession given to the locator beneath the surface only to veins which have their top within the surface lines. We respectfully submit that this is not the intention of the statute, and has never been held to be so. *The intent of the statute by the use of this language was only to define extralateral rights to veins.* In other words, it was to extend the exclusive possession not only to the claim actually located, but to all veins wherever they dipped outside of the claim proper, provided they had an apex within the claim. Instead of being words of limitation, they are words of expansion.

We would respectfully ask why a distinction is made between patented and unpatented claims. We are told that the ground beneath a valid lode claim, except the veins contained therein, is "free and open to exploration," before patent. We would ask why is it not equally "free and open to exploration" after patent?

Sec. 2325 of the Revised Statutes, which makes provision for securing a patent, simply says that *a patent for any lode claim located for valuable deposits* may be obtained by following out the provisions of that section. That is, a patent only covers what is included within the location. If the land beneath the surface except that very small part of it which contains the lode is the property of the government and does not belong to the locator by virtue of his location, it must remain the property of the government, and never pass to the locator by virtue of any patent proceedings. In other words, if the court is correct, we can not conceive why there should be any

difference after patent. This court, in the case of Chambers vs. Harrington, 111 U. S., 350, uses this language:

> "But in all this legislation to the present time, though by appropriate proceedings and the payment of a very small sum, a legal title in the form of a patent may be obtained for such mines, the possession under a claim established according to law is fully recognized by the acts of Congress, and the patent adds little to the security of the party in continuous possession of a mine he has discovered or bought."

But if the rule stated in the case at bar is to prevail, a patent does add much to the security of the party in continuous possession of the claim. It gives him a tract of ground that he never before possessed. This case of Chambers vs. Harrington is but one of many in which this court has heretofore held that a valid location was just as valuable and conferred exactly the same rights upon the locator that a patented location conferred. In other words, as said by Mr. Justice Miller in that case, the patent added but little to the rights previously existing. We would cite the following authorities in regard to that:

Forbes vs. Gracey, 94 U. S., 762.
Belk vs. Meagher, 104 U. S., 279.
Gwillam vs. Donnellan, 115 U. S., 45.
St. Louis Co. vs. Mont. Co., 171 U. S., 650.

In these and many other cases this court has announced the rule which it announces in the Clipper

case, that the entire body of ground went to the locator of a valid location. Numberless cases have been decided in the state courts reaching the same conclusion. The rule as it has been understood in Colorado is well stated in the following language of the Supreme Court of that state:

> "Thus it appears that a mining claim on the public domain is real property and the subject of complete ownership as a claim, and that the locator thereof, or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the government patent, and is entitled to the exclusive possession and enjoyment against every one, including the United States itself."
>
> McFeters vs. Pierson, 15 Colo., 201.

The Supreme Court of Montana and the Circuit Court of Appeals for the Ninth Circuit have construed the language of the statute in a case where the distinction made in the case at bar was urged, and both reached the conclusion for which we contend. We quote from the Circuit Court of Appeals the following:

> "The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives

the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws, as we construe them, grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute (section 2319) declares 'the lands' in which valuable mineral deposits are found to be open to occupation and purchase; and section 2325 provides that 'a patent for any land claimed or located for valuable deposits may be obtained in the following manner.' These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the 'veins, lodes and ledges' is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In Copper Co. vs. Heinze, 64 Pac., 326; 53 L. R. A., 491, the Supreme Court of Montana held that the owner of a mining claim is prima facie the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the

lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said:

" 'Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines is an expansion of the rights which would be conferred by a common-law grant.'

"Of similar import is State vs. District Court of 2d Jud. Dist. of Silver Bow County (Mont.), 65 Pac., 1020.

"In Doe vs. Waterloo Min. Co. (C. C.), 54 Fed., 935, Judge Ross said:

" 'Except as modified by the statute, no reason is perceived why one who acquires the ownership of possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law.'

"In Consolidated Wyoming Gold Min. Co. vs. Champion Min. Co. (C. C.), 63 Fed., 540, Judge Hawley said:

"'Hands off of any and everything within my surface lines, extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim.'"

St. Louis M. & M. Co. vs. Mont. Min. Co., 113 Fed., 902.

The text writers have all reached the same conclusion. Mr. Lindley says:

"Whatever may be reserved out of the grant created by the perfection of a valid lode location, one thing is quite manifest. The right of a senior locator to the exclusive possession of the surface can not be invaded, assuming, of course, that at the time to which the location relates no rights of way or servitudes were imposed upon the land. While, as we shall hereafter see, outside apex proprietors may penetrate underneath the surface in the lawful pursuit of their veins, the law expressly preserves the surface from invasion.

"The only qualification to this rule is the privilege accorded under certain circumstances to junior locators to place the lines of their locations upon or across the senior claim, discussed in previous sections. The use of such privilege is not to be considered an invasion, as no rights can be asserted thereby in hostility to the senior title.

"What are the presumptions, if any, flowing from the ownership of the surface?

"Prima facie, everything within the vertical bounding planes belongs to the locator.

"In the language of Judge Hallett: 'We may say, that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own boundaries he is regarded as the owner of all valuable deposits until some one shall show a higher right.'

"While the courts do not altogether agree as to the weight of testimony necessary to overthrow this presumption, there is an undoubted consensus of opinion in support of the above rule.

"We may safely base our discussion of the more important elements of the law applicable to lode locations upon this presumption, and, as we progress, endeavor to show the circumstances under which, and extent to which, reaching ultimate conclusions by such gradations as the nature of the subject will permit."

1 Lindley on Mines, section 551.

Mr. Morrison, Mr. Snyder and Barringer & Adams are all to the same effect.

Morrison Mining Rights, 10.

Snyder on Mines, 420.

Barrington & Adams, 317.

Any other conclusion than these quoted can not be gathered from the statute. In reason this must have been the intent of congress beyond peradventure.

It would be a strange mockery to grant a miner the surface and withhold the subsurface. We could understand the rule should the court hold that in agricultural grants or townsite or similar entries only the surface passed and that it was the settled policy of the government to hold all mineral beneath the surface for exploration and purchase by those who should first discover them. Both reason and precedent might sanction a ruling of this kind. At common law gold and silver were royal metals and were the property of the crown even when found beneath the surface of a subject. But a ruling to the effect that the locator of a mine only gets the surface and the actual veins in his ground, and that the balance of the subsurface does not pass, is incomprehensible. The business of a miner carries him beneath the surface. To him the surface is only an incident, merely a part of the working by which he passes underground to engage in his real work. The shafts, tunnals, winzes and workings by which ore is found and brought to the surface are nearly all made in the country rock and not in the veins themselves. Very few veins are large enough to contain all these workings between their walls. And yet we are now told that the ground in which these workings are made does not belong to the locator, but is the property of the government and may be entered by the first comer to explore for other veins. The newcomer, too, is at the mercy of the next man, because no possessory title can be acquired to anything beneath the surface except lodes themselves.

We do not believe the court ever intended to announce this doctrine, and we are satisfied that it will grant our application for a rehearing, and that upon

more serious reflection it will withdraw this entire proposition. This means, of course, a rehearing of the entire case, and, as subsequent conclusions are based on this premise, a reversal of the entire position of the court.

II.

THE DOCTRINE OF RELATION.

The second proposition announced by the court which we believe to be radically wrong, is that of relation. The court here reverses the old doctrine that a patent relates back to the date of the location of the claim and announces substantially that it only goes back to the date of entry. It makes the date of location rest in parol and not upon the record title in the public offices provided by the federal and state law. Heretofore parties have rested secure upon the record required to be kept; now they must, even after patent, be prepared to meet attacks upon their title that no prudence can provide against and frequently no wisdom can prevent from being successful.

The reasons given by the court for its conclusion are chiefly two: (1) the origin of the locator's title is an unverified location certificate placed upon land records and not filed with any land officer, and (2) the order of time in which the various acts of location are performed is immaterial and the location certificate is no evidence thereof, and neither is the

patent. We confess that neither of these appeal to our reason, and neither is sustained by the statutes or the decisions.

The location certificate is expressly provided for by the federal statute; it must state the date of location, and the application for a patent must contain sworn statements of the same facts. We quote the following from section 2324 of the Revised Statutes:

> "The miners of each mining section may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

Pursuant to the authority of this statute the legislature of Colorado has passed an act regulating the location of mining claims. We quote the following sections:

> "3150. The discoverer of a lode shall, within three months from the date of discov-

ery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

"First—The name of the lode.

"Second—The name of the locator.

"Third—The date of location.

"Fourth—The number of feet in length claimed on each side of the center of the discovery shaft.

"Fifth—The general course of the lode as near as may be.

"3152. Before filing such location certificate the discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.

"Second. By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

"Third. By marking the surface boundaries of the claim."

The state statute is as binding a regulation as the federal statute. *But both expressly provide that a lode must be discovered before a location can be made or a location certificate filed.* Is not the certificate therefore a federal record just as much as though it were filed in the land office? A look at the patent

proceedings will demonstrate this fact even more clearly. Section 2325 reads in part as follows:

> "2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent under oath, showing such compliance * * *."

The land department has made a number of rules governing applications for patent, some of which we desire to call to the attention of the court:

> "31. Accompanying the field notes must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and his grantors, if he claims by purchase) with the mining rules, regulations and customs of the mining district, state or territory in which the claim lies, and with the mining laws of congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.
>
> "32. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as

follows, viz.: Where he claims to be the locator, or a locator in company with others who have since conveyed their interest in the location to him, a full, true and correct copy of such location notice should be furnished, as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records. Where the applicant claims only as a purchaser, a copy of the location record must be filed under seal or upon oath as aforesaid, with the abstract of title, under seal or oath as aforesaid, brought down to date of filing the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record other than those set forth in the accompanying abstract.

"The abstracts herein required may be certified to by the proper recorder, or by an abstractor or abstract company, duly authorized by state or territorial statute, if abstracts so certified by abstracters or abstract companies are by statute receivable as evidence in the courts of such state or territory, in the same manner and to like extent that abstracts certified by the recorder are now admitted; provided that proof be furnished that the abstracts so certified by abstracters or abstract companies are receivable as evidence in the courts as aforesaid."

None of these statutes or rules were copied in any of the original briefs filed in this cause, and we think, on reading them, the court will be convinced it has made a mistake, because their meaning is clear. The original record is a solemn one, made in a public office, and the patent application requires it to be verified. The record is not to be made until the vein has been discovered, a discovery shaft sunk and the boundaries marked upon the ground. The location certificates in the case at bar complied with these requirements. They will be found on pages 92-95 of the printed transcript. *But, says the court, they were not sworn to.* The statute does not require it in the first place, and, in the second place, the patent application stating the same thing was sworn to.

But, again, we are told that the order in which the various location steps are taken is immaterial, and, therefore, a patent does not relate back to the location. We do not admit the conclusion follows from the premise, but we deny the truth of the premise. It has been held, in a number of cases relating to controversies *before patent*, that the first party to perfect a valid location should prevail, and the order of taking the steps was not conclusive. But never until the case at bar was it held that a patent could be assailed under the guise of this doctrine. Ever since Mr. Justice Field laid down the rule in the first great mining trial had in the West, until the decision in this case was announced, this was regarded as fundamental. Mr. Justice Field said:

> "Each patent is evidence of a perfected right to the claim conveyed, the initiatory step for the acquisition of which was the

original location. *If the date of such location be stated in the instrument, or appear from the record of its entry in the local land office, the patent will take effect by relation as of that date*, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872."

Eureka Con. Co. vs. Richmond M. Co., 4 Sawyer, 302.

Even as late as 182 U. S., this court said:

"The patents were proof of the discovery, and related back to the date of the locations of the claims. The patent could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

Calhoun M. Co. vs. Ajax M. Co., 182 U. S., 499.

The mining world has rested secure in that conclusion down to the present moment, and now it is told that this is not true so far as tunnels are concerned. A tunnel claimant can attack a patent collaterally. To-morrow we may be told the same thing about a townsite or mill site claim, an agricultural entry or a forest reserve. And finally, the rule may be relaxed even as between mining claims, and a patent be of no more value than a location certificate, a title in fee of no more stability than a title by possession.

If the statutes and rules we have quoted mean anything, they mean that a discovery must be made, a location certificate prepared and filed and when a patent is asked for it must be based upon *a sworn statement of these facts.* Unless these facts are proved by sworn testimony no patent can issue. Why then should not the patent relate back to these facts? They are essential, the issue of the patent is a determination that they exist, and a determination that is binding on the world. Mr. Justice Brewer has himself clearly defined what an advertisement for and the procuring of a patent means. He says:

> "The proceedings before the land department are judicial, or quasi-judicial at least. The publication is process. It brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. True, no adverse claimant or supposed claimant may be named in the notice; no process may be served personally upon him; but that does not avoid the notice or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated. Unknown heirs are thus often brought in by a published notice. Tax proceedings, condemnations of rights of way, admiralty cases and many others present familiar illustrations. The sufficiency of the notice in these cases is unquestioned, even though the adverse claimant be not named,

> and no personal service be had. And if the parties be brought in, obviously it is that their claims be presented and determined. The succeeding section provides how such claims, if presented, shall be determined. Even without such section the purpose would be apparent. It would be grievous wrong to leave disputed claims unsettled, and when the owner of lands making such general offer prescribes time, place, tribunal and manner of settling adverse claims, such provisions are a part and condition of the offer, and should be vigorously insisted upon by the courts."

In the opinion, the court inquires: "Are all other parties concluded by the locators' unverified assertion of the date, etc.?" The court states the tunnel location was "verified by the oath of one of the locators," and while its opinion is no where expressly based on such verification in one case and lack of it in the other, the distinction between the two must have been present in its mind as a factor in deciding the case, or it would not have referred to it on every occasion when such verification or lack of it *could have made any difference.* We will admit that under some circumstances a sworn statement is better evidence than unsworn evidence, but we deny that in this case it is true. The location certificate of the lode claim does not, under the law, require a verification; that of the tunnel does. That is the reason why a verification in one case appears and in the other it does not. There is no reason why Winchell and McNeal should have sworn to their location certificate; no one ever does,

and as the law requires no verification, would such verification have added anything to the value of the certificate as evidence? Therefore, we maintain no presumption should be indulged in against the truth of the facts stated in Winchell and McNeal's location certificate because it was not verified.

But this is not all. The patent was not issued to these men as the court seems to imply, with no other evidence of the date of discovery than that contained in the unverified location certificate. The application for patent which was filed, contained a sworn statement of the date of discovery. This application was filed, to be sure, subsequent to the filing of the location certificate of the tunnel, but time is certainly not of the essence of the value of oaths. Consequently we have the verified location certificate of the tunnel filed in a "State office" February 25, 1892, opposed to the location certificate of the lode filed in the same state office February 1, 1892, unverified because not required by law to be verified, and the application for patent of the lode claim filed in the United States Land Office August 5, 1893, and sworn to in the manner provided by law.

We maintain the weight of evidence is in favor of the lode locators. Their statements, because part of the proceding *in rem*, passed on by the Land Department, are binding on all the world. The tunnel certificate became a part of no adjudication, and was open to no attack.

It is held that the land office merely decided that the discovery preceded the entry, and did not adjudicate the date. We submit this is not the case. The applicants were required to file a sworn statement of the date of discovery, not merely of the fact that a

discovery of mineral had been made. This sworn statement was open to attack, and the date often is attacked in adverse proceedings. It was not, it is true, attacked in this case, but nevertheless we hold that the date is required as an essential part of the application and is passed on, and being passed on in a proceeding *in rem*, is conclusive and binding on all the world. Like in any other adjudication, an allegation that is not denied is admitted. It may well be said in the light of this case that in any adverse proceeding the date of the discovery is not decided; merely that the discovery of one claimant was made prior to that of the other.

The court says: "The first appearance of the claim on the records of any office of the United States is the entry in the local land office of August 5, 1893," but it apparently forgets that this appearance was a sworn one and that as applications for patent go, it was made sooner after the discovery than a great majority of applications, as one of the requirements is that $500 worth of work had been done on the claim.

And as the court makes some sort of distinction or discrimination between appearances in state offices and in United States offices it is well to call attention to the fact that the lode has appeared in the United States office in a verified statement while the tunnel has never appeared in the Land Office, and does not appear in any United States office until the appearance of this suit four years later, and then merely as a defendant in an action.

The court says that the patent relates back only to the entry, but why name that date? The entry only determines the existence of preexisting facts and of facts which are matters of record and sworn to in the

application. We submit that some reason should be given for overriding the undisputed judgment of the mining world based upon a long line of unbroken decisions by this court.

The decisions relied upon by the court do not sustain its conclusions.

None of the decisions relate to patented claims, but all are based on contests relating either to the granting of patents or between possessory titles. It is, of course, fundamental that so long as the title has not passed from the government, the various steps necessary to make a complete location rest in parol, and the difference between a possessory title and a patented title is that the owner of the possessory title, if his right of possession is challenged, must prove all of these steps. The text writers and cases cited in the opinion by the court are based upon this condition of affairs. None of them are controversies that have arisen after the issuance of a patent. It was always supposed that a patent conveyed a good title, which, when placed upon record, would say to the world that the government, after investigation, had issued its patent so as to complete the possessory title which was upon record at that time; that is, the location certificate having been recorded, fixing the date of location and making a record of it, the patent placed upon the record would say that the government had, after a careful examination, confirmed the title claimed in the location certificate. It was simply a method of perpetuating testimony, as it were. The owner of the possessory title had at all times to prove the various steps of location, and, so far as the inception of his title was concerned, it rested in parol. He could re-

move these disadvantages by securing patent, but is there any advantage in securing a patent, if he is still compelled to keep his defenses on hand and be ready at any time to prove the various steps required to make a valid location? It is just as essential to the owner of a valid location that a discovery notice should have been posted at his shaft; that his claim should have been staked off; that he did the annual assessment work each and every year, yet if the doctrine of the court in this case is to prevail, the owner of the patented title will be required to prove any of these facts when some one claiming a prior title assails his rights. For instance, it is very justly stated that the order in which these various acts of location is taken is immaterial, provided no adverse rights have intervened. That is, if a man has neglected to stake his claim for more than ninety days after the discovery of mineral, and yet stakes it before third parties have acquired any rights, he loses nothing by his neglect. Suppose that a tunnel claimant should claim that in the interval he had filed a location certificate for his tunnel, and his rights had attached. Under the doctrine announced by this court in the case at bar, he would be entitled to prove this fact, even though the mining claim had passed to patent. The doctrine is not limited merely to the question of the date of discovery. It necessarily opens all questions on all the acts of location.

Suppose for argument there was no discovery made at the time; nevertheless this court in its opinion in this case holds that the patent is conclusive patent, therefore, instead of merely relating back to proof that a discovery was made prior to entry. The

the time of the entry as is announced in the court's opinion should relate back to the first valid act performed in locating the claims. The principle involved in limiting the relation back to the entry only is a dangerous one and introduces a new kind of uncertainty into mining laws and rights, and if that doctrine is established, as it certainly will be on the authority of this case, it means an overruling of the old doctrine of relation, and a new rule promulgated that in proceedings *in rem*, such facts only can be considered as adjudicated as were actually adjudicated, and these facts only established as were necessary to such adjudication. Even in an adverse proceeding, the date of the discovery may be established by direct proof, yet as the only question necessary to decide is whether one claimant's discovery was prior to the other's or not, then that is to be considered as all that was adjudicated and the relation back will only be to the date of entry.

This we maintain is the logical meaning of the doctrine enunciated in this case.

Now if the doctrine of relation applies to the tunnel, does it not apply only to the veins discovered in the tunnel, and not to the bore itself? Is not the principle of relation here based on the discovery of the vein in the tunnel and its relation back to the location of the tunnel? Can this relation be construed so as to permit the bore of the tunnel in its full 3,000 feet to relate back? Locations made within 3,000 feet of the mouth of the tunnel and within fifteen hundred feet on either side of the bore are made at the locator's peril as these veins are liable to be subsequently discovered in the tunnel. But can the tunnel claim a

right of way through a patented claim located subsequent to the tunnel? Is not the case similar to one building a ditch? If appropriated ground lies in his way, he can acquire a right of way, but he must pay for it. He has, no more than the ditch builder, the right to cross another's land. He may prospect all he wishes and may discover veins not disclosed at the surface that apex in the patented lode and may be entitled to these veins because as to them his discovery relates back to the original location, but it is only by torturing and confusing all rights and extending the law in one case to one entirely different that his right to the right of way can be claimed to relate back.

The doctrine of relation carries a title back to the first step in its inception always excepting where an adverse right has intervened.

Morrison's Mining Rights, 11th Ed., page 97.

McGinnis vs. Egbert, 8 Colo., 41.

Strepey vs. Clark, 7 Colo., 614.

Does this adverse right mean—

A right capable of settlement in adverse proceedings, or

Any right opposed to the right of claimant?

The words "adverse right" mean, we maintain, such rights as are capable of adjudication and such rights only. Otherwise the above doctrine means nothing. Using the word "adverse" in its broadest sense, there are a thousand and one ways in which an adverse right might intervene. A mortgagor or a lienor, the county by virtue of a tax assessment, *the owner of a right of way of necessity*, might each be

said to acquire an adverse right, but would any one say that their rights would prevent a relation back of the title?

If the tunnel, therefore, has no adverse right, it has no right that intervenes and the patent of the lode claim relates back to the filing of the location certificate, which is the first valid act even assuming the discovery was not made until after the tunnel location.

It can not, we maintain, be argued that the tunnel location has an adverse right and has not an adverse right. That it has an adverse right in so far as its right is sufficient to prevent the lode locator's rights from relating back, but it has no adverse right that can be adjudicated during the proceedings pending patent of the lode claim. To such a paradox is reduced any effort to establish a priority of the tunnel over the lode.

III.

A TUNNEL CLAIMANT SHOULD BE REQUIRED TO ADVERSE A LODE CLAIM WHEN THE ACTUAL LINE OF THE TUNNEL CROSSES THE LODE CLAIM.

This is the first case that has ever decided that a tunnel claim was not a mining claim, and not required to file an adverse where the line of the tunnel actually crossed the lode claim and carved out of the lode claim itself a portion of its ground. The uniform ruling of the land office has been that a tunnel claim should adverse. The latest expression of the opinion

of the land office was the case of Byron B. Burton, 29 L. D., 235. There the decision of Secretary Hitchcock was rendered in a carefully prepared opinion by Judge Van Deventer, at that time assistant attorney general for the department of the interior, and now United States circuit judge for the Eighth circuit. Judge Van Deventer is one of the best qualified officials to pass upon qustions of this kind ever connected with the land department. He held, in that case, that a tunnel claim was a mining claim, and where the line of a tunnel crossed a lode claim, it should be made the subject of an adverse suit. The case of Ellet vs. Campbell, 18 Colo., 510, afterwards before this court in 167 U. S., 116, was the case of an adverse filed by the owners of a tunnel against the application of a lode claim. In the nature of things, there is no reason why a tunnel is not an adverse claim, within the meaning of the statute. The court must, of course, understand that there is a distinction between a tunnel itself and the discovery of veins in the tunnel. There is also a distinction to be made between a tunnel itself, as to whether it actually crosses a lode claim, or, as in the case of the Rico-Aspen Company, passes entirely outside of the lode claim. If we concede that the course of the line of the tunnel does not actually conflict with the lode claim, there would be no question for an adverse suit. In that case the conditions are those mentioned in the opinion on this case. That is a condition of affairs that may or may not arise in the future, and, of course, a party would not be held to adverse upon mere contingencies, but even then some of the courts of the western states have held that an injunction would lie to restrain the owners of the lode claim

from getting a patent until it was ascertained whether or not the owners of the tunnel claim would, in the future, have rights which might conflict with it. This suggests a practical remedy for an emergency of this kind, but it is useless to discuss this condition of affairs, because it is not before this court at this time.

In the case at bar we have an actual conflict of territory. We have one mining claim applying for patent; we have another mining claim lying practically across the first claim, which is contending for an adverse position to such claim. We submit that, under any ruling or construction, it should be required to file its adverse suit. There is a distinct conflict over a distinct tract of ground. The mere fact that none of the surface is claimed should not cut any figure in the matter. It is the material underground that is of value in a mining claim, and not the surface of the ground. A tunnel claimant is not insisting upon a mere right of way. His tunnel is more than that. It cuts a distinct segment from the mining claim itself. We insist that a tunnel amounts to much more than a mere right of way. A valid tunnel gives to the owner a title to a tract of ground the size of his tunnel and the length of the bore. For instance, if the owner of a tunnel should drive it 3,000 feet in length and not discover a single lode, he would still be entitled to his tunnel as an article of property, and no one could take up land which would give them the title to this tunnel unless there was a distinct abandonment by the owner. Suppose, for instance, that instead of the tunnel having reached the Ocean Wave claim, in the case at bar, it had actually been driven through the claim at the time

the Ocean Wave applied for patent. Would it be reasonable for this court to say that the owners of the tunnel should not, under these circumstances, protect their rights by an adverse suit, and, in case they failed to adverse, under such circumstances would they then be entitled to the ownership and use of their tunnel through the Ocean Wave? We do not believe that this would be conceded for a moment, and yet, is there any difference between that state of facts and those in the case at bar, so far as the maintenance of rights is concerned? We ask the pardon of the court for the discussion of this principle, because a special brief was filed by Judge Helm, as *amicus curiæ*, discussing this identical point, and we only ask the court to give to that brief careful consideration before passing upon this proposition. It seems to us so clear that, where there is an actual conflict between a lode claim and a tunnel claim, that there should be an adverse suit filed, that we can not forbear once more to urge this point upon the attention of the court.

The opinion rendered in this case would seem to be founded on a general principle that tunnel rights can never be the subject of an adverse proceeding, because those rights are too uncertain.

The error permeating the whole decision is based on a sentence almost at the end of the opinion: "Until the discovery of a lode or vein within the tunnel, its owner has only a possibility." A possibility of what? Of discovering a vein. But he always has more than a possibility of his bore. That is always certain; he is compelled to note certainly what he claims in his location notice. Hence a reason why he

should not be required to adverse a lode location. When he can not tell whether he has any rights or not can not be be applied to this case where he knows what his rights are.

Confusion can only result from considering tunnel rights as one group or class of rights. In reality there are two entirely distinct kinds of rights belonging to and accruing from a tunnel location.

1. The right to the bore itself.
2. The right to veins discovered therein.

The first one can never be said to be uncertain. The second one may be uncertain but when those rights cease to be inchoate and become certain, that is, when a vein is discovered in the tunnel, the tunnel locater is required to adverse if the vein discovered in the tunnel is subsequently discovered from the surface and the lode claimant attempts to patent. Here says Lindsey, section 725, in the light of the Enterprise-Rico Aspen case, the rule is: "Where a lode claimant applies for a patent to a location embracing a lode which has been previously discovered in the tunnel, the tunnel claimant will be compelled to adverse to perfect his right."

In point of fact, so far from the law being as is noted by the court in its opinion in its case, that a tunnel locator need not adverse an application for patent of a lode claim lying across the line of the tunnel, *the exact opposite is the law* laid down in the books and in all the decisions that have been rendered on this point. Never before has it been said that the tunnel claimant need not or must not adverse in such a case. Even where a condition has arisen as in the Rico-Aspen-Enterprise case where it was held that

it was not necessary for the tunnel applicant to adverse, the opinion was based on reasoning which could only mean that where a tunnel claimant had rights that could be ground for adversing he must adverse.

Back vs. Sierra Nev. Con. Mng. Co., 2 Idaho, 386; 17 Pac., 83.

Bortie Co. vs. Bechtel Co., 1 L. D., 584.

Barrington & Adams, page 496.

IV.

IN THE RECORD IN THIS CASE THE TUNNEL CLAIM APPEARS TO BE IRREGULAR AND VOID.

Another fact overlooked or at least not referred to is that the Uinta Tunnel is not a statutory tunnel, under which any right can relate back to its location as discoveries made in the tunnel can relate back only when the statutory requirements in locating that tunnel have been complied with. The record clearly shows that the Uinta Tunnel was not located under the statute, nor can a tunnel located under the Colorado act comply with these requirements, but not with those of the federal statutes, be entitled to the benefit of relation which the federal courts give to tunnel locators under the federal statutes.

Suppose it possible to make a location under the federal statutes that did not comply with the requirements of the Colorado statute. Could such a

tunnel be said to have the right to pass under or through patented claims?

Mr. Lindley says:

> "A discovery may be made in any ordinary tunnel not located under the tunnel laws. To complete his initiatory rights, however, the locator must in such case make a surface location the same as in cases of ordinary surface discovery. It is only when the tunnel site has been properly located and claimed under the tunnel laws that the vein discovered in the tunnel need not be located at the surface."
>
> 1 Lindley, Section 482.

Now the law regarding tunnel locations is not found in section 2323. The subject is regulated entirely by rules prescribed by the commissioner of the general land office under the direction of the Secretary of the Interior, the authority for such regulation being found in revised statutes, sec. 2478, and these rules when not repugnant to the acts of congress have the force and effect of laws.

> Orchard vs. Alexander, 157 U. S., 383.
>
> Cosmos Ex. Co. vs. Gray Eagle Oil Co., 112 Fed., 4.

The rules of the land office require a tunnel locator, as soon as his projected tunnel enters cover, to give notice by erecting a substantial board or monument at the base thereof upon which must be posted a good and sfficient notice containing:

1. The names of the parties or company claiming the tunnel right.

2. The actual or proposed course or direction of the tunnel.

3. *The height and width thereof.*

4. The course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus as in case of lode claims.

This applies to the present case. If the vein discovered in a non-statutory tunnel does not relate back to the location of the tunnel, certainly the tunnel itself can claim no such relation back.

The Uinta tunnel, as shown by defendant's Exhibit F, was a surface location, 3,000 feet long by 1,500 feet wide, and in marking the boundaries by stakes on the surface these exterior lines were marked, *but no marking of the line of the bore was made.*

And *at the time* of posting the notice and marking out the lines a full and correct copy of such notice, defining the tunnel claim, must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, *setting forth the facts in the case*, stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon, *the extent of the work performed*, and that it is their bona fide intention to prosecute work on the tunnel so located and described with reasonable diligence.

In the record (folio 225) Exhibit F is a certified copy of the location certificate filed in the recorder's

Nor can the tunnel owners, with their defective location, be heard to say that the lode location was

not properly made. If the tunnel location was, as we have shown, void, how can the tunnel locators claim a priority over the lode claim, though the location of it was, as they allege, defective?

There is one other point in this connection worthy of notice. The court, while denying the necessity of an adverse on the part of the tunnel claimant, because the tunnel's right were uncertain and inchoate, nevertheless recognizes the tunnel right as certain and vested in this sentence:

"If the tunnel right was vested before a discovery in the plaintiff's lode claim the defendant ought to have the benefit of it;" and further on quotes section 2339 as to the effect of rights and easements that have "vested and accrued."

Setting aside the question just discussed as to whether the tunnel right vested at all by reason of the null location notice we desire to ask when a tunnel right vests? A tunnel right is not a right of way like a ditch right created by user; it is a most a right to a right of way. If the analogy of the court is good, the tunnel right does not vest until occupation and user. But the analogy is not good. If section 2339 intended to recognize such tunnel rights, it would have mentioned them. Further, too, the continuation of section 2339, which the court does not quote, is interesting and instructive:

> "But, whenever any person in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

The right of way granted to ditches, roads, etc., is expressly declared by the statute to be subject to prior rights, and while a right of way can be claimed across a mining claim, it must be paid for. Hence the reasoning does not apply. Even should the ditch be begun before the mining claim is located, such subsequent location in the path of the ditch, makes the right of way, so far as running through the mining claim is concerned, one that must be paid for.

The incompleteness of the analogy between the two cases is apparent.

First. The right of way for water in arid regions is granted on the ground that water is a necessity. Rights of way of necessity have always been classified different from other rights of way.

Second. The right of way must be paid for when it crosses a located claim, and this is so, even though the location is made subsequent to starting the ditch.

We submit, therefore, that the opinion rendered in this case is not only based upon an assumption of facts that the record does not sustain and is contrary to the law as heretofore construed and applied, but constitutes a menace to the mining industry of the United States in what it implies and what may be inferred from it, as well as in what it expressly decides. If a tunnel locator is not required to adverse to protect his tunnel bore, a wide field is opened for unscrupulous adventurers and the condition of the prospector rendered correspondingly more precarious. If the date of discovery is held not to have been adjudicated in the proceedings leading to the patent of the lode claims in this action, it is, we maintain, the logical outcome of this opinion, to hold that the *date* is never decided in any patent proceeding, whether

adversed or otherwise, but merely the *priority* of one location over another. If a patent, which has always heretofore been considered inviolable, may be attacked or modified in this action, an entering wedge has been found for other oblique attacks. If the tunnel claimant, with his void location in this case is permitted all the rights of a valid locator, then there is no reason why these rights should not be held to belong to the locator of any tunnel. And, finally, if the patent in this case relates back to the entry only, then, we submit, it will be necessary to modify the whole doctrine of relation and carry the relation back to the entry only in every case.

This opinion makes the tunnel bogey, which has always been feared by miners, and which it has been the purpose of statutes, district rules, land office rules and decisions of courts to restrain as much as possible, an actual menace, even more threatening than the miner has pictured it. In a word, this opinion attacks the whole mining industry of the United States.

We ask, therefore, for a rehearing on the questions decided in the opinion heretofore rendered in this case.

Respectfully submitted,

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Attorneys for Petitioner.

TUNNEL-RIGHTS UNDER THE UNITED STATES MINING LAW.

By R. W. Raymond.

Section 2323 of the Revised Statutes is as follows:

> "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing upon the surface, made by other parties, after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel."

This is the only provision in the Revised Statutes concerning tunnel-rights. Perhaps it is fortunate that there are no more. Certainly this one is ambiguous and perplexing enough, and additional ones of the same character would have made confusion worse confounded.

In attempting to discuss this provision, and to set forth its interpretation by the courts, I am led at the outset to point out the historic cause of its fundamental defect—a cause which underlies also many other defects of the Act of 1872.

The customs of miners and the Act of 1866 recognized, as the foundation of mining title, the priority of discovery. The Act of 1872, intended to remedy certain evils developed in the administration of the Act of 1866, comprised various provisions for that purpose (provisions, that is to say, which assumed the principle of the former Act, and only modified its application) and also provisions of a totally different character, creating the new principle of apex-rights, and thereby nullifying the customary rights attached to discovery pure and simple. The Act containing this revolutionary innovation was never carefully harmonized throughout, in accordance with the new principle thus established, and presents many features really intended to be parts of the old *discovery*-law (so to speak) and not framed to be parts of the new *apex*-law. This tunnel-section is one of these anachronisms. As an amendment to the Act of 1866, it is, taken by itself, simple and clear enough, though perhaps not wise. As a part of the Act of 1872, it is inconsistent, incomplete, and mischievous.

This statement as to its original purpose will be self-evident upon an examination of its text.

1. It first gives to the owners of a mining tunnel the right of possession to all veins discovered in the tunnel (and not previously known to exist) *to the same extent as if discovered from the surface.* (The limitation to 3000 ft. from the face, and to the

line of the tunnel, I pass by for the present.) Now, under the Act of 1866, discovery from the surface gave a right of possession; and this right could be exercised independently of the ownership or location, by the discoverer, of any tract of land. But the Act of 1872 requires as a prerequisite of the possessory right to a vein the location of a tract containing the apex; and discovery not accompanied by such a location does not confer that right. It follows that, as a part of the later law, the provision above quoted, literally taken, confers nothing upon tunnel-owners except the right of a surface-discoverer, to make a location on the apex. If A discovers from the surface a lode, but locates his claim, unfortunately, so that it does not include the apex, and B subsequently makes, upon a later discovery of the same lode, a location properly covering the apex, A's prior discovery gives him, under the present law, no rights superior to those of B. All that this section, as thus far quoted, does for C, a tunnel-owner, is to put him in the position of A;—and there he must stay, until he can find the apex of his discovered vein, and locate upon it. Evidently this ludicrous result of the attempt to benefit C by legislation is due to the fact that the provision was framed to fit the Act of 1866, and is out of joint with the building which, while it was being thus mildly tinkered, was also being radically reconstructed.

2. Secondly, this section provides that, during the diligent prosecution of the tunnel, locations made by other parties, on its line, of veins not appearing on the surface, shall be invalid. It is clear that such locations of veins which *do* appear on the surface

are not thereby declared to be invalid. On the contrary, they are evidently meant to be valid, if based on prior discoveries. This is simply a recognition of the preceding provision, by which the discovery in the tunnel is put upon the same footing as the surface-discovery. In either case, the inception of title dates from the discovery. This second provision makes a further distinction with regard to "blind lodes," and these only. The discovery of such lodes in the tunnel dates back, as a foundation of title, to the commencement of the tunnel, and therefore invalidates locations subsequent to that date, though based on discoveries actually antedating the tunnel-discovery.

Again we may observe that this provision is consistent and practicable enough with the Act of 1866, and quite out of joint with the Act of 1872. Construed as a part of the former Act, it amounts to this: that a party diligently prosecuting a tunnel for the discovery of new lodes shall have the exclusive right to the fruits of underground discoveries of "blind lodes" within a certain area. For instance, if A is driving a tunnel, and B, sinking a shaft on the line of that tunnel and less than 3000 ft. from its mouth, comes upon a blind lode, before A gets there with his tunnel, B can not make a valid location of that lode; and when A reaches it, his second discovery of it, dating by relation back to the commencement of his tunnel, will be legally the first discovery, and thus a valid basis for title. At the same time, I repeat, according to the letter of the law, B can validly locate a lode *appearing on the surface* at any time before its actual discovery in the

tunnel. The reason for these provisions (considered as simple amendments to the Act of 1866) is plain. They were intended to encourage the driving of deep tunnels, without discouraging surface-prospecting; and to this end, the tunnel-owner received a monopoly of the fruits of his underground explorations within a certain pre-empted field, while at the same time he was not allowed to monopolize the lodes which could be found at the surface. With regard to the latter, he was placed on the same footing as the surface-prospector—priority of actual discovery being the basis of superior title.

But when we look at this provision as part of the Act of 1872, its impracticable character—or else its utter lack of value—becomes evident. For this Act attached to a valid lode-location two new appurtenances. The first is the ownership of the tract embraced in the location—which, as the courts have repeatedly held, is, by the very act of location, withdrawn at once from the public domain. The second is the ownership of all other veins, besides the vein located, which have their apexes within the location; and this ownership vests in the locator at once, before any discovery of the said other veins and without any location of them. Now let us suppose that while A is running a tunnel, B discovers a lode on the surface before the tunnel has reached it, and makes a location on it, as he has, under the terms of this section, a clear right to do. But that location proves afterwards to contain the apex of another lode—a blind lode—which A reaches in his tunnel, perhaps thus making its existence known for the first time. A cannot claim this lode, so far as B's location holds it, because

it has been decided to B already. True, the statute says that a location by B on this blind lode shall be invalid under the circumstances. But B has made no such location. The lode belongs to him by virtue of his perfectly valid location on another lode, to wit, a lode appearing at the surface and first discovered by B. A's special tunnel-right, as part of the present law, seems therefore to be either practically valueless, or to be contradictory to other features of the law. As we shall presently see, the judicial attempts to solve this contradiction so as to leave A something of value have varied according to the choice, between the conflicting principles, of the one which shall take precedence.

With regard to the condition of this subject prior to 1866, Mr. Curtis Lindley says:*

> "We think it may be fairly stated that, prior to any legislation upon the subject by Congress, in popular estimation the purpose of a tunnel-location was that of discovery of blind veins or deposits, whose existence it might be difficult, if not impossible, to establish by surface-exploration, and that such discovery by means of the tunnel should be treated as the equivalent of one made from the surface. As to questions of priority, it was a mere race of diligence. Rights upon

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*A *Treatise on the American Law Relating to Mines*, etc. By Curtis Lindley, of the San Francisco Bar, 1897, Vol. 1, p. 467.

> the discovered lode dated from the discovery in the tunnel, and not from the date of the tunnel-location. Surface-prospecting within the vicinity of the projected tunnel line was not inhibited. The chances of a successful discovery in many formations were largely in favor of the tunnel method, and this was the inducement for projecting it; but the tunnel locator's privilege was not understood to be an exclusive one within any defined surface-area."

This, I think, is a true picture, except as to the statement that "the chances of a successful discovery in many formations were largely in favor of the tunnel method." That I seriously doubt. The driving of tunnels for discovery has not been generally profitable, so far as I know, apart from the artificial advantage conferred by the law in some cases, of dating the discovery of a vein back to the location of the tunnel. That is to say, if B, C, D, etc., are actively mining from the surface of a mountain upon valuable lodes, and exploring in depth, and if the formation be such as to favor the occurrence of blind lodes in depth, it may be profitable for A to prosecute with "diligence" a tunnel projected to underrun their claims, so as to acquire by virtue of his tunnel location a prior right to the blind lodes which either he or they may discover. But there was no such privilege as this attached to tunnels before 1872. And, according to my personal recollection, there were very few deep tunnels, if any, run before 1866. It was after that date that the "tunnel-fever" arose in Colorado,

and led to the enactment in 1872 of the section we are now considering.

I may say, in passing, that many of the positive faults of the two leading United States mining laws have been due to local interests, seeking protection or advantage without sufficiently regarding the general effect of the legislation sought. Thus the local conditions of the Comstock mines dictated the main features of the law of 1866. In 1872, the mining interests of Colorado were at the front, and the protection of Colorado tunnel-companies was called for. There had been a sudden development of such schemes in that state, due partly to the wide discussion of the Sutro tunnel in Nevada, partly to the recent introduction of machine drills, cheapening and accelerating the driving of tunnels, and partly to the favorable conditions presented by the precipitous Colorado canons, between mountains known to contain numerous fissure veins of rich ore.

I had occasion at an early date to utter a warning against the folly of multiplying tunnels for this purpose. In my report as United States Commissioner of Mining for the year 1870, I observed *that the so-called tunnel fever had been a noteworthy peculiarity of the operations of that year, particularly in Clear Creek County, Colo. Innumerable tunnels

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*For the full statement here condensed, see "Statistics of Mines and Mining in the States and Territories West of the Rocky Mountains for the Year 1870." This report was transmitted to Congress March 16, 1871. My discussion of this subject begins on page 322.

had been located, and much money had been already wasted in attempts to develop thus the "wealth" of this, that or the other mountain. I pointed out that a tunnel driven to find new loads must be a cross-tunnel, run wholly in country-rock, and was likely to be the most expensive of all forms of prospecting. Its cost must be not only large but indeterminable beforehand; and experience had shown that an equal expenditure made in surface-explorations would be likely to find many more lodes of value.

Again, cross-cutting may find a lode, but does not determine its value. This requires additional work upon the lode itself, and ultimately, shafts.

The advantage of cheaper transportation through a tunnel is not great enough to warrant its cost. But the advantage of drainage (with or without incidental saving in transportation and ventilation) is often so great as to warrant large outlay in tunneling. This depends, however, on the amount of water to be handled, which, like nearly all other facts determining the advisability of a long adit, can only be known after the extensive development of the mine or mines to be served.

Consequently, deep cross-tunnels should be auxiliary and not primary works; should be run chiefly for drainage; and should connect with the workings of established and productive mines. This is the case in all other countries; and all experience in our own confirms the principle. For such a purpose, one deep drainage-adit is sufficient for a large area; and the multiplication of parallel tunnels at the same level is folly.

I quote from the conclusion of my exposition of this subject in 1870 the following portions:

> "It is almost as absurd to run a cross-tunnel after blind lodes as it would be to sink a shaft at hap-hazard in dead rock. The rights attached to a tunnel-claim, unaccompanied by surface-ownership of known lodes to be pierced, are extremely visionary. The only tunnel-right which would be really valuable, our laws do not give. I mean the right to exact a royalty from mines benefited by the tunnel. This has been granted by contracts and confirmed by legislation in the case of the Sutro tunnel in Nevada, an enterprise which, I need hardly say, as it is connected with the largest, deepest, and most productive mines in the country, does not belong in the category I am now discussing. The tunnel-royalty was, in Europe, for centuries the privilege of every one who should drive a tunnel not less than 30 feet deeper than any preceding one, so as to benefit an overlying mine. I do not say it would be wise to make this provision generally applicable to our mines; but this I do say, that in the absence of some such tangible source of revenue, deep cross-tunnels, underrunning only undeveloped or unknown lodes, or lodes belonging to other owners, are gratuitous folly."

From this general condemnation, certain individual enterprises were excepted by me, in the report

above cited; yet even with regard to these, doubts and cautions were expressed, which later experience fully justified. While some of them have not been total failures, I do not think that any one ever did or ever will repay its cost.

The situation thus explained led to the desire, on the part of the tunnel-projectors, for some more definite and valuable encouragement to such schemes. The power to exact a royalty for drainage was not asked. At that time, the cost of drainage was oppressive in a few mines only; and a compulsory subjection to royalty on that account would have been unpopular and impracticable. Nor could it be expected that the miners generally would submit to the prohibition of surface-prospecting within a large area overlying a projected tunnel. The *bonus* finally secured was embodied in Section 2323, above quoted, and consisted of the two provisions I have already discussed, the first of which was simply a re-enactment of exsting custom, while the second gave, as to blind lodes, a sort of preemption or inchoate right, not previously existing.

Let us now inquire what is the actual effect of this section, as construed by the courts, in connection with the Act of 1872, of which, as I have explained, it was not originally framed to be a part.

1. To the generally loose, clumsy, and incorrect use of English in the Act of 1872, Section 2323 forms no exception. The hand that could write "apex," meaning not a point, nor a line, but the total thickness or cross-area of a vein nearest the surface, and could describe the "extending" of horizontal surface-lines "downward vertically," was quite competent to

label a cross-adit "tunnel." Properly speaking, a tunnel is open at both ends. The meaning of this section, however, has never been questioned; and the word "tunnel" has in fact now acquired among miners this special significance. The section undoubtedly refers exclusively to adits starting from daylight, and running into the mass of the mountain. And while it does not specify cross-adits, it can not be applied to adit-drifts, or tunnels run in on a vein, and following the vein. For such a tunnel could not discover other veins, being kept within one already discovered.

2. The term "face" is another misnomer. The face of a tunnel or drift is the same as its breast—that is, the area of unbroken rock at its inner end. Taken in this universal sense, the section would give to the tunnel-owner an intolerable privilege, namely, a preemption right always advancing, and reaching 3000 ft. ahead of the point at which he might have arrived at any given time. But this construction, though required by usage, is so repugnant to law and justice that it has never been urged. There is general acquiescence in the practice of the Land Office (explicitly confirmed, I believe, by the courts), which assumes the face of a tunnel to be the first full exposure of its height and width after entering under cover.

3. The "line" of the tunnel is not so misleading a term, though sufficiently obscure. It has been authoritatively construed to mean the space between the sides of the tunnel, throughout the length of 3000 ft. from its face in the direction claimed.

4. The manner of making a tunnel-location on the ground, and otherwise perfecting it, is not pre-

scribed by the statute directly. But the General Land Office requires that, as soon as the tunnel enters cover, the locator shall post at the "face" a notice containing the names of the parties, the actual or proposed direction of the tunnel, its height and width, and the course and distance from the face to some prominent landmark. This notice, together with an affidavit of certain facts and of the intention to prosecute the work with diligence, must be filed for record, like the notice of a lode-location. Moreover, the "boundary lines" of the tunnel are to be established by stakes and monuments, at proper intervals, from the face to the terminus of the 3000 ft. of length. This last requirement seems almost absurd. The law mentions only the "line" of the tunnel; and this line, one would think, could be sufficiently shown by monuments along the axis. It is hard to see any use in staking out a parallelogram 3000 ft. long and, say, 8 ft. wide.

There is, indeed, some reason to believe that the original idea of the framers of Section 2323 was that a tunnel-locator might lay out a tract 1500 feet wide (*i. e.*, 750 ft. on each side of the tunnel) by 3000 ft. long, as the area within which other locations should be invalid, while he continued to work. If I remember correctly, this was the view entertained in 1872 by some enterprising Colorado adventurers, who undertook, by marking off tunnel locations side by side, along the foot of a mountain, to monopolize a large amount of mineral ground. The public indignation aroused by this attempt resulted in a hasty retreat from the position, and in a letter from the Commissioner of the General Land Office, addressed to Sen-

ator Chaffee of Colorado, Sept. 20, 1872, which declared:

> "The line of the tunnel is held to be the width thereof, and no more, and that upon this line only is prospecting for blind lodes prohibited while the tunnel is in progress, and that the right is granted to the tunnel-owners to 1500 ft. of each blind lode, not previously known to exist, which may be discovered in the tunnel; but that other parties are in no way debarred from prospecting for blind lodes or running tunnels so long as they keep without the line of the tunnel as herein defined, the said line being required by our regulations to be marked on the surface by stakes or monuments placed along the same from the face or point of commencement to the terminus of the tunnel-line aforesaid."*

5. With regard to location upon a lode discovered in a tunnel, the Land Office has held that no patent can issue without a surface-location, and that this location must include the apex. This view, which has been followed in some judicial decisions, and which Mr. Curtis Lindley, in the treatise already cited, maintains with much force and clearness, seems to me to satisfy fully the text of the provision that the tunnel-owner shall have the right of possession "to

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*Copp's *United States Mineral Lands*, 2d edition. "Land Office Rulings," p. 90.

the same extent as if discovered from the surface." For under the present law, a surface-discovery gives no other right than that of location. The discoverer must locate a claim; and if he locates so as not to cover the apex, his priority of discovery will not cure that defect in his title.

But the United States Supreme Court, in a recent case (Campbell vs. Ellett, 167 U. S.), has adopted the rule that a failure to mark on the surface the boundaries of a tract claimed will not destroy the right of the tunnel-owner to veins discovered in the tunnel, provided he posted proper notices at the mouth of the tunnel, and filed them in the office required by the local statute. In this decision the preponderance has been given to the principle of discovery over the principle of the apex-law; and the result is going to be a very perplexing confusion in many cases. But I will not stop here to point them all out. The mention of a single example will suffice. The law gives to a locator on the surface, rights in all lodes apexing within his location, whether blind lodes or not. Such a location, made before any tunnel was commenced, would undoubtedly be valid against the tunnel. If a blind lode first struck in the tunnel should prove to have its apex within such a prior and valid surface-location, and therefore to have been withdrawn from the public domain before any tunnel-rights existed in the premises, the tunnel-owner could not claim it. Yet if he is not bound to make a surface location including the apex of the vein he claims, how can any one know whether it is lawfully claimed by him or not?

6. The tunnel-owner's right of possession dates by relation back to the time of location of the tunnel-

site. This rule, I cannot but believe, will have to be modified in some cases hereafter. Taken together with the following, settled in the same case (Enterprise vs. Rico-Aspen, 167 U. S., 108), it produces a strange result.

7. The questions, how many feet along a vein discovered by tunnel may be lawfully claimed, and whether this length must be equally on both sides of the tunnel, have been differently answered in the State courts. But it is useless to consider the ingenious solutions thus offered, now that the United States Supreme Court, in the case just cited, has held that the location of a claim to a vein discovered in a tunnel may be made on its discovery by taking the full length of 1500 ft. allowed by United States Revised Statutes, Section 2320, on either side of the tunnel, or any such proportion thereof on either side as the locator may desire; and is not limited to 750 ft. on each side of the tunnel on account of a failure to indicate, when the tunnel was located, what particular 1500 feet he would claim.

This presents the remarkable situation that the tunnel-owner, by simply locating his tunnel, fixes the date of his title to property yet undiscovered, but that he need not decide where he will place his claim upon it until actual discovery. In other words, a width, not of 1500 ft., the maximum length of lode-claim allowed by law, but of 3000 ft., is set apart for his optional occupancy of any 1500 ft. of continuous vein-length within it. Nobody can go safely into that dangerous zone until the tunnel-locator shall have made his discovery and exercised his option. Moreover, it seems to follow that, even after a tunnel has passed

through the course of an intersecting vein, without "discovery" of it, the tunnel-owner, guided by developments made by surface-explorers outside, may go back, hunt again, find what he wants to find, and date his "discovery" back, so as to take the bonanza developed by others. If this is not locking up the public domain against exploration, it is difficult to see what would deserve that title.

Here again the Supreme Court has given predominance to the wrong principle. And its ground (like the ground of some similar decisions below) seems to be that the absurd and exceptional privileges conferred by this construction upon tunnel-owners are justified by the wisdom of encouraging deep tunnels. As I have already explained, such tunnels, for exploration only, are generally foolish, and ought not to be encouraged. There is some reason to fear that the latest construction of the "tunnel-section" of our law will help to encourage schemes of blackmail, and delusive schemes of speculation. We have seen already in certain pompous prospectuses some of its fruits. It constitutes, in my judgment, a new danger to legitimate industry without opening any real chance for legitimate investment. Still, it is now confirmed as the law by the highest authority; and mine-owners must meet the fruits it may create for them.

As a legitimate remedy for the evils thus inflicted upon mining by Congress and the courts together, I can think of nothing better than the simple abolition of Section 2323 of the Revised Statutes.

The owners of lode-locations made before the location of any tunnel projected to underrun them

may, I think, even under the extreme views recently announced by the Supreme Court, rest secure in their possessory or patented titles. To those whose locations are of later date than the location of a tunnel which does, or will, underrun them within 3000 ft. from its mouth, I would say:

1. Watch for a chance to buy out the tunnel-claim, if you can. This is likely to be the cheapest way out. Moreover, if your mine is valuable, and if you are likely to be seriously troubled with water, the tunnel may be worth to you, in the end, all that it costs you to buy it and extend it, quite apart from its bearing upon your title.

2. If there be no tunnel threatening to underrun your property, locate and start one at once. The "diligence" of prosecution required by the law is not an onerous burden, compared with the cost of fighting pirates. Moreover, such a tunnel might be started by an agent of all the surface-owners, under an agreement for the equitable adjustment of costs and benefits.

3. If you have to face a fight with a tunnel-owner, asserting ownership of the ground you are working, and basing his claim on an alleged discovery in his tunnel, dating back to the original location of the tunnel, you have still a good deal of fair fighting-ground.

a. You can thoroughly overhaul the history of the tunnel, and possibly show that it has not been "diligently" prosecuted. On this point the requirement of the United States law is very lenient. But, in fact, it is not really a requirement, but only a limit

set to the leniency of local legislation. The laws of the States may be much more severe in their definition of "diligence."

b. If your location, though made after the location of the tunnel, was properly made in a lode appearing at the surface, and not yet discovered in the tunnel, I think it is valid, and secures to you, not only the ownership of the located lode, but also that of all other lodes, blind or otherwise, apexing within your ground. This opinion seems to contradict the sweeping dictum of the United States Supreme Court in the Rico-Aspen case, cited above; but I do not think the precise situation here stated was clearly before the court; and, at all events, I think there is still a good fighting chance for its recognition. I need not argue at length my grounds for this opinion. The chief one is that neither the statutes nor the rules of the General Land Office prohibit the location in ground traversed, or to be traversed, by a tunnel, of lodes appearing at the surface, and that, with regard to *such* lodes, at least, the tunnel-discoverer is explicitly endowed with the same possessory rights—no more and no less—as the surface-discoverer. But these rights include the possession, upon location duly made, of other lodes than the one explicitly located upon; and (within the boundaries fixed by the end lines of the location) all title to all the said lodes is, by the act of location, vested in the locator, and tract and lodes are thereby withdrawn from the public domain. In view of these considerations, I think the case I have stated presents good fighting-ground; and I wish that this issue, free from all others, could come before the United States Supreme Court; for I

believe that thoroughly impartial (though, in the difficult interpretation of our amazing mining law, not always thoroughly intelligent and foreseeing) tribunal would find a way to reconcile the letter of the statute with its equitable administration. And, with regard to the particular point just stated, I believe this all the more confidently because, as to this point, the strict literal construction of the statute seems to me the most just and reasonable that can be given to a confessedly obscure phrascology.

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Supreme Court
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JAMES H. McKENNEY
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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1902.

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THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY,
Petitioner,

v.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY,
Respondent.

Brief and Argument in Opposition to Petition for Writ of Certiorari.

CHARLES J. HUGHES, Jr.,
Attorney for Respondent.

P. J. SMITH PRESS, 1009-11 LAWRENCE ST., DENVER.

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Brief and Argument in Opposition to Petition for Writ of Certiorari.

In *Forsyth* v. *Hammond*, 166 U. S., 514, the court, reviewing the cases, says:

> "While not doubting its power, has been chary of actions in respect to certioraris."

> "And further, that while this power is co-extensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of the nation in its internal or external relations demands such relief."

The contention is, that the Circuit Court of Appeals in deciding this cause, announced certain principles of law in direct conflict with the decision of this court in *Calhoun G. M. Co.*, v. *Ajax G. M. Co.*, 182 U. S., 499. That this case involves the identical questions, and facts, passed upon in that case.

The facts in the *Calhoun-Ajax* case are, that the Monarch and Mammoth Pearl lodes were located prior to the location of the tunnel site.

That a receiver's receipt issued for the Monarch and Mammoth Pearl, prior to the location of the tunnel site.

In that case the court passed upon four propositions; three only have any bearing here, in fact, one thereof, is controlling:

1st. Did the Ithica tunnel have a right of way through the Monarch and Mammoth Pearl?

2nd. Did the tunnel acquire by virtue of its location, the ownership to, and right of possession of the blind veins cut therein, etc?

4th. **Whether or not the tunnel owners should have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place in the Monarch and Mammoth Pearl claims, prior to location of tunnel site?**

In that case, all these questions were answered in the negative, and properly, because:

1st. The lode claims in that cause had been segregated from the public domain, before the location of the tunnel.

2nd. The lode claims had been entered for patent by the issuance of a receiver's receipt, before the location of the tunnel.

3rd. The land office at the time of the location of the tunnel, had passed upon every question necessary to make the lode claims valid locations, at which time, no other rights had been initiated.

(*a*) The said department by issuing receiver's receipt decided prior to the issuance thereof, the claims had been properly and legally located

(*b*) That a discovery had been made, (but the time at which said discovery was made, was not decided).

(*c*) That the necessary labor had been performed.

(*d*) That the locators or owners were entitled to enter claims for patent.

4th. The Government had been paid for the land embraced within the surface bounderies of the lode claims by the owners thereof, and as such owners of said claims, they were entitled to own, possess and enjoy the same not only as against the United States, but against the world. All this occurring before the location of the tunnel site.

Under these facts and findings, the Ithica tunnel had no more right to be located across these claims, than it would have to be located upon and across ground that had been patented for years prior to its location.

In referring to the opinion in the *Calhoun-Ajax* case, relative to collateral attack upon decisions of the Land Department, Judge Sanborn, in this case, says:

> "Its decisions of questions within its jurisdiction, are impervious to collateral attack. This was the question which the Supreme Court answered in the Calhoun-Ajax case, and which, if the language in the opinion of that case is *carelessly read, without knowledge of, or reference to the question before the court*, it may seem to be broader, a careful examination of the facts which the record there discloses, demonstrates the proposition, that the decision went no further."

In the *Calhoun-Ajax* case, at the time of the entry of the Monarch and Mammoth Pearl for patent, there were only two parties interested in the claims, the locators thereof, and the United States, as between these parties, the decision of

the Land Department was controlling, thereafter, no one could initiate any title through the United States to these claims.

This cause presents an entirely different state of facts:

1st. The Uinta tunnel was properly and legally located on the 13th day of January, 1892.

2nd. On this date it is contended, there was no location of the Ocean Wave and Little Mary claims, notwithstanding the location certificates bear date, January 2nd, 1892, and that no discovery of mineral had been made in said claims or either of them until long after the location of the tunnel.

A location certificate is not required by the United States Statutes, nor by the statutes of all the States, but in those States in which it is required, it is *prima facie evidence* only of such facts as are required by the statute to be stated in the location certificate.

Lindley on Mines, Vol. 1, p. 502;
Jones on Evidence, Sec. 521;
Campbell v. Rankin, 99 U. S., 261;
Jaulzen v. Arazona Co., 20 Pac., 93;
Pollard v. Shiyeley, 5 Colo., 309.

Lindley on Mines, page 502, in treating of this question, says:

> "Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. * * *

> While many of the States require the date of the discovery to be stated in the recorded certificate, we do not think that this would be evidence of the *fact* of discovery. A discovery once proven, such a record would, *prima facie* fix the date. The question of discovery is the most important of all the acts required in the proceedings culminating in the perfected location. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three States (California, Idaho and Montana) the certificate is executed with no solemnity. It is not either acknowledged or sworn to. It is a mere *ex parte* declaration in his own behalf of the party most interested. * * *
>
> The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent. When the locators right is challenged, he should be compelled to establish by proof outside of the certificate, all of the essential facts, without the existence of which the certificate possesses no potential validity."

We believe that the authorities are numerous, that the location certificate is not the proper evidence by which to prove the fact of discovery; but at the most, the only claim that is made for it is that such location certificate is *prima facie* proof of the fact.

It is sought by the petitioner to make a location certificate conclusive proof of the fact of discovery and of the date of the same. If there be force in the rule that such certificate is *prima facie* proof, then, by the very meaning of the words "*prima facie*," the respondent was entitled to

introduce evidence to rebut it, and all evidence upon this point was excluded, over the objection and exception of respondent by the trial court. While some degree of sacredness has clung around the patents of the United States, limited however, by the well considered decisions, in which it has been stated that wherever the United States has issued a patent without jurisdiction, the patent is of no more validity than any other instrument which confers no rights. We know of no sacredness which clings round a location certificate made, as had been suggested by a learned author on mining laws, without any solemnity, an *ex parte* proceeding, made by a party who is the most interested one in the entire course of the location. It would be an absurdity if litigation, in which property of great value is involved, should be determined by the *ex parte* acts of the man who is most interested himself; and that, too, at a time when there was no controversy and no reason to controvert in any manner the facts as set out in the location certificate.

The patent is conclusive only of those facts which are necessary in order to procure its issuance. It is not conclusive of any fact which the Land Department is not called upon to pass on. Without a discovery, it would be an impossibility for the Land Department to issue a patent. But the *time of discovery* is not made an essential element in the issuance of it, and cannot therefore be precluded by the issuance. The time of location and the time of discovery is not essential to the issuance of the patent, and is not concluded

thereby. As to discoveries made subsequent to a location, while they validate the claim and relate back to the location, they expressly do so provided no adverse rights intervene.

> Morrison's Mining Rights (10 ed., p. 29 and cases cited).
>
> Lindley on Mines, Vol. 1, p. 454 and note.

In other words, a patent does not live or die with a location, which is set out in the original application as being the date of discovery. But if discovery is made in the claim at any time before the application for the patent is passed upon, and such discovery is proven, a patent may issue therefor, provided the rights of intervening locators are taken care of. So in this case it is not necessary that this patent relate back to the original date of location, as set out in the certificate of location, in order to give effect to the patent. A patent may live and continue to have force with a date set for the actual discovery of the claim very different from that which is contained in the certificate of location. The question is, after all, one of jurisdiction. A judgment can never in effect exceed the jurisdiction of the court. If by law the Land Department, which is given the power to issue such patents, has no right or power to determine the time of location, and if, as in the case of the St. Louis Smelting Company v. Kemp, 104 U. S. 636, the law is as follows:

> "Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of the party resisting it to show, if an entry is not stated in the instrument,

> that no entry of the land is made as an initiatory proceeding."

Then we cannot escape the conclusion that it is not in contravention of any doctrine of conclusiveness regarding a patent, were a party resisting it to show the date of discovery, and to hold otherwise would be to violate the decision of the Supreme Court.

The doctrine of relation is an equitable one, and will only be applied by a court of equity in furtherance of justice to all parties. If our contention is correct, that we are entitled to invoke the law of estoppel against one who knowingly sat by and saw the petitioner expend upwards of one hundred and twenty-five thousand dollars in the improvement of its property, and under the claim of right to go through the property belonging to petitioner, and made no objection, but acquiesced therein, this is certainly an equity in itself, which may be invoked in favor of the relator.

This court, in the case of *Evans* v. *Durango Land and Coal Company*, 25 C. C. A., 532, referring to this equitable doctrine of relation, said:

> "It may be conceded that a patent for public land, has, on several occasions, been held to take effect as of date of the initial step taken by the patentee, under the laws of the United States, to obtain a title to the land. * * * Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully consummated by the payment of the purchase money, or by the doing of some other equivalent act, such as the sur-

render of a land warrant, or the selection of land to supply and ascertain deficiency in a land grant. * * * *

The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin, and designated to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect."

3rd. The work was continuous upon the tunnel at all times. The Ocean Wave and Little Mary were entered for patent August 5th, 1893; patent issued, December 21st, 1893. At the time of application for patent, and the entry thereof for the Ocean Wave and Little Mary claims, there was no duty upon respondents to file an adverse.

Enterprise Mining Co. v. Rico-Aspen Mining Co., 167 U. S., 104.

Justice Brewer, in rendering the opinion in that case, says:

"The obvious contemplation of the law in respect to these adverse proceedings is, that there shall be a present *tangible* and *certain right, and not a mere* possibility. Of course the owners of the Vestal claim had notice from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develope, and so they were not prejudiced by the failure to adverse. And as the defendant could not in any suit which it might institute establish a certain adverse right, and as litigation in the courts is

> based upon facts, and not *upon possibilities*, it seems to us, nothing was to be gained by instituting adverse proceedings and therefore, nothing was lost by a failure so to do."

If, as Justice Brewer says, nothing was lost by failure to institute adverse proceedings, why, we ask, would not respondent be entitled to make the same proof after issuance of patent when the question should arise between the lode claimant, and the owners of the tunnel site, as to whether there was a location of and discovery on the lode claims, the same as could have been offered if the Land Department had not passed upon the questions that petitioner contends estops and precludes respondent from making such proof?

If this controversy had arisen prior to August 5th, 1893, and before these claims were entered for patent, petitioner would not for a moment contend that proof of no location or discovery would not be competent. It would be conceded in such case, that if the proof established no location or discovery, that the tunnel site must prevail.

At the trial of the case, petitioner was not content to rest its case upon the introduction of the patent itself, but as proof of a date to which the patent should relate back, there was introduced the original location certificates of the two claims, and the amended location certificates (printed Rec. 80, fol. 133) and this over the objection of relator, that the location certificate itself was not proof of a discovery. Did petitioner load both the pleadings and proof at the trial of this cause,

with surplusage, or was there a necessity for both the pleadings and proof in this respect? If it was necessary for petitioner to allege, as a separate matter, the date of the discovery, and to prove the same, it was certainly competent for respondent to deny such discovery, and by such proof, as it had at hand, to meet any evidence in respect to the time of location.

There is scarcely any doubt, but what the rights of a patentee, to property obtained from the government, relate back beyond the date of the patent to some prior time. What this time is has been disputed.

Lindley on Mines, Vol. 2, 975, states the rule as follows:

> "It is accepted as a well established rule of law, that the title conveyed by a mining patent relates back to the inauguration of the right; that is, to the location upon which the patent proceedings are based."

Citing as authority therefor:

Haydenfelt v. Daney G. & S. M. Co., 93 U. S., 634;

St. Louis Smelting Co. v. Kemp, 104 U. S., 636;

Deffenbach v. Awake, 115 U. S., 392, 405;

Silver Bow M. & M. Co. v. Clarke, 5 Mont., 378;

Talbot v. King, 6 Mont., 76;

Deno v. Griffin, 20 Nev., 249;

Eureka Case, 4 Saw., 302;

Kahn v. Old Tel. Co., 2 Utah, 174.

Barringer and Adams on the Law of Mines and Mining in the United States, at page 417, state their conclusions as follows:

> "The patent being simply the evidence of the grant, when it had been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights, unless they be such that the patentee has lost the right to question them by reason of his failure to file adverse claims, as required by Rev. Stat., 2325. Where such rights exist, the relation is to the date of the issuance of the certificate of entry. The date of location may be stated in the instrument, or may appear in the record of the entry in the Department, and may be thus established, or it may be otherwise proven."

Whether, then, the patent, when issued relates back simply to the date of entry, or to the very origin of the rights of the claimant of the property, is immaterial here to us.

In the case of *The Calhoun Gold Mining Company* v. *The Ajax Gold Mining Company, supra*, which was a case appealed from the Supreme Court of the State of Colorado, and which reversed a long line of decisions in reference to cross lodes, there is an opinion covering some five pages dealing with rights of the most vital nature, overturning law, which has been established for many years; and after determining in favor of the defendant in error in that case upon its contention in reference to cross lodes, there is contained, at the end of the decision, the following paragraph:

> "An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithica tunnel site, no ore had been discovered in two of the patented claims of the defendant in error, to wit: the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of discovery and related back to the date of the location of the claims. The patents could not be collaterally attacked. This has been decided so often, that a citation of cases is unnecessary."

This is the paragraph upon which, in the end, the petitioner contends conflicts with the decision rendered herein.

Patents are a proof of discovery. Patents do relate back to date of location. Patents cannot be collaterally attacked. On these propositions as contained in that paragraph, there can be no dispute. The law upon them has been well settled. But does that paragraph say that the patent is proof of the time of a discovery? Does that paragraph mean that the patents relate back to the date of the location, *as shown by the location certificate*, and that no other proof can be introduced to prove that fact? Does that paragraph mean, when it says that patents cannot be collaterally attacked, that the date of the location, when not shown by the patent itself, cannot be shown by any other evidence outside of the patent? Unless these questions are answered in favor of petitioner, the writ cannot issue.

Not only would it put a strained meaning upon the words used in that decision, to give them such

far reaching effect, but it would override not only a prior decision of the Supreme Court of the United States itself, to wit: the case of the Enterprise Mining Company v. Rico-Aspen Mining Company, *supra*, but it would with scarcely a line, with no authority, and without a reason presented, wipe out a line of well-reasoned and high-standing authorities to the contrary, where the question was a pivotal one, where arguments were heard and the question was determined in the full light of its being an important one. In addition to all that, it would be directly contrary to a learned opinion which was rendered by a court, one of whose members is the very justice who writes the opinion in the Calhoun case, *supra*. The case to which we refer is the case of The Last Chance Mining Company v. The Tyler Mining Company, 61 Fed. R., 557. This case, upon appeal to the Supreme Court, was reversed, but solely upon the question of the admissibility of certain evidence, and as to its effect as *res adjudicata*. No criticism is by the Supreme Court passed upon either the decision or the reasoning of the Circuit Court of Appeals in that case, upon this question of the relation of a patent back to its date of discovery. It was a case in which extra-lateral rights were to be determined by priority of location, and, in the course of its opinion, the court says:

> "Was the patent of the Last Chance conclusive as to the date of the location of the Last Chance claim? * * * The Last Chance thereupon, without objection, introduced witnesses who gave testimony tending to show the date of

discovery and the location, of the Last Chance claim, the staking of the claim, posting notice of location, recording of notice, doing assessment work, survey for patent, etc. The Tyler introduced testimony in rebuttal upon these points, against the objections of the Last Chance. The testimony of the Last Chance tended to show that a valid location of the Last Chance Clance claim was made on the 17th day of September, 1885, three days prior to the location of the Tyler. The testimony in rebuttal tended to show that no location of the Last Chance was made until after the Tyler was regularly located. The patent issued to the Last Chance was, of itself, evidence that the Last Chance lode had been discovered; that the location had been properly made; that it had been marked so that its boundaries could be readily traced; that the statutory requirements in respect to the posting of notice and having it recorded had been complied with; that the necessary amount of work had been done; that the application for a patent, the notices given by the applicant, and all the other steps to acquire a patent, as required by law, had been regularly taken. Counsel for the Tyler admit that the patent itself is evidence of all these facts, and from its date upon its face, it is conclusive in a court of law of all these facts, because without them it could not lawfully issue. The patent is the final judgment and decree of the Land Department that the holder is the owner of the land it embraces, according to its terms, and in a court of law, it is ironclad as title. * * *"

"The controversy between the parties was as to the date when the location of the

Last Chance was made. Was it prior or subsequent in time to the location of the Tyler claim? The patent, does not of itself, fix the date when the location was made. It is silent upon that subject. The respective claims join each other on the surface. There is no conflict between them as to the surface ground. Both claims are valid, and both have the government title—one by patent; the other by a receipt and certificate of entry from the United States Land Office, which, as before stated, is the substantial equivalent of a patent."

"Did the court err in allowing testimony as to the date of the Last Chance location? To what does the title obtained by the patent relate? How is this question to be determined? Is it true that the patent is conclusive of the fact that at the time the application therefor was made, the applicant had a valid location, and had, in all respects, fully complied with the requirements of the mining laws; but it does not fix the time when the location was made. In order to determine this question, it is necessary to introduce evidence independant of the patent. And, in such cases, as is said in Shepley v. Cowan, 91 U. S., 338, the first thing in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be first in right. The law provides when and how adverse claims to an application for a patent may be made; but such controversies are usually confined to conflicting claims as to the surface ground. When there is no conflict on the surface, there is ordinarily no necessity for a protest being made. Where the law does not require a protest to be

made, and an adverse suit to be brought to determine the right to possession, before the patent issues, and a patent is regularly issued and thereafter a controversy arises as to the time when the patent takes effect, and it is claimed that it relates back to the date of the location of the claim, that date if material to the issue raised must be established by evidence in the same manner as any other question of fact not settled by the patent itself."

"The right to a patent once vested is equivalent, so far as the United States Government is concerned, to a patent issued. When issued, the patent relates back to the inception of the right of the patentee. Stark v. Starr, 6 Wall, 403. But where it is sought to make a patent relate back of the date when the application for the patent was made, and *attach itself to some prior right, the facts showing such prior right must be established by proof.*"

"It necessarily follows from this reasoning, that it devolved upon the Last Chance to show the time when a valid location of the Last Chance was made, in order to connect its title by patent with the date when the location of its claim was made."

It was decided in this case:

"The question whether the discovery of minerals in place, were made in the lode claims before or after the location of the claims to the tunnel site was perfected, is open to determination by means of the testimony of witnesses and other competent evidence *de hors* the patent in any litigation between the parties involving their conflicting claims."

> "The averments that no discovery of mineral in place within the lode claims had been made, before the location of the claim to the tunnel site, should not have been stricken from the answer of the defendant, and its evidence to sustain them, should have been received."

All through the brief and argument of the petitioner, for writ of *certiorari*, it is contended and adhered to with a "reasoning that is dangerously absurd," that the facts in the Calhoun-Ajax case, and the one at bar, are identical. Consequently, the law as announced in that case, should have control in this. In view of the many decisions of this court which must necessarily be overruled if the contention of petitioner is sustained, we can not refrain from setting forth in full, the clear, logical, forceable and able construction placed upon the Acts of Congress in reference to tunnel and lode claims rendered by Justice Sanborn in this case.

The decision follows those rendered by this court, and other Federal and State courts. They are all in perfect harmony with the decision complained of.

The logical conclusion to be deducted from reading Justice Sanborn's opinion, compels the judicial mind to stamp it with approval.

The decision above referred to can be found in the 119 Fed. Rep., at pages 164-170, and is as follows:

Statement.

"The writ of error in this case challenges the trial of an issue involving the rights of the respective parties to the action to the possession of the space within the bore of a tunnel where it passes through two lode mining claims beneath the surface of the earth. The Creede and Cripple Creek Mining and Milling Company was the plaintiff and The Uinta Tunnel Mining and Transportation Company was the defendant in the action below, and they will be so styled in this statement and in the opinion which follows. The plaintiff was the owner of two lode mining claims called the Ocean Wave and the Little Mary, which were entered for patent on August 5, 1892, and were patented on December 21, 1893. The plaintiff alleged in its complaint that these claims were duly located and discovered on January 2, 1892. The defendant was the owner of a claim to a tunnel site which extended through these lode claims beneath the surface of the earth and which was located on January 13, 1892. It also owned certain lode claims which had been located on blind veins that had been discovered in the tunnel after the lode claims of the plaintiff had been patented. The mining claims of the plaintiff were between the portal of the tunnel and the defendant's lode claims and the latter had driven its tunnel through the plaintiff's claim and was using it as a way to bring to the surface of the earth the ore it was extracting from its blind veins. The real issue was whether or not the defendant had the right of way along the bore of its tunnel through

the lode claims of the plaintiff, and the determination of this issue depended upon the priority of their respective claims. The plaintiff asserted that its claims were discovered and located on January 2, 1892. The defendant averred that its tunnel was located on January 13, 1892, and that no discovery of mineral in rock in place was made within the lode claims of the plaintiff until after its tunnel site was located. These averments of the defendant were stricken from the answer and the evidence which it offered to sustain them was rejected. Exceptions were taken to these rulings and there was a verdict and judgment for the plaintiff."

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question, whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site, open to determination by means of evidence or testimony *de hors* the patents? This is the principal question presented by this record. If the query were whether or not it is competent to show by proof outside the receiver's receipts or the patents that there had been no location of the patented claims or no discovery of the lodes therein before they were entered for patent, there would be no doubt that a negative answer must be returned to the question, for the reason that this is an issue between the parties to a proceeding be-

fore the Land Department, which that tribunal necessarily considers when it permits the entries of the lands, and its decisions of questions within its jurisdiction are impervious to collateral attack. King v. McAndrews, 111 Fed., 860, 863, 50 C. C. A. 29, 32. This was the question which the Supreme Court answered in Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S., 499, 502, 503, 510, and while, if the language of the opinion in that case is carelessly read without knowledge of or reference to the question actually before the court, it may seem to be broader; a careful examination of the facts which the record there discloses demonstrates the proposition that the decision went no further. In that case the receiver's receipts on the lode claims of the appellee had been issued before the claim to the tunnel site was located. (Page 502.) In a proceeding between the lode claimants and the United States, the Land Department had decided that mineral in place had been discovered within the claims and had permitted their entry. Subsequent to this decision and to these entries the owner of the claim to the tunnel site located it across the lode claims and upon the trial offered to prove that there had been no discovery of mineral in place within those claims before they were entered. The trial court rejected the offer. The Supreme Court said:

> "The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked."

Thus, it may be seen that the only proposition there decided was that one who had initiated no claim upon lands when they were entered by other claimants could not subsequently collaterally attack the decision of the Land Department that there had been a discovery of mineral in place upon the claims at some time before they were entered.

Counsel for the plaintiff rely upon the decision and opinion in this case and insist that it fairly sustains the rulings of the court below. But there are radical and controlling differences between the question presented in that case and the issue of law before us in the case in hand

1. A judgment is binding upon the parties to the proceeding in which it is rendered and upon their privies. The parties to the judgments of the Land Department by which it allowed the entries of the lode claims in the case of the gold mining company were the United States and the owners of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees. They estopped all parties who initiated claims upon or interests in the lands under either of the parties to the proceeding subsequent to the judgments of the Land Department. The claimant of the tunnel site in that case initiated his claim under the United States, one of the parties to that proceeding, subsequent to the judgments. It was therefore a privy of the United States and was estopped by the judgments of the

Land Department from proving that no discoveries had been made upon the lode claims before these judgments were rendered. This is not the case in the action before us. The claim to the tunnel site was located on January 13, 1892. The judgments of the Land Department allowing the entries were rendered on August 5, 1892. At that time there were three parties interested in the land, the lode claimants, the United States, and the claimant of the tunnel site. Two of these parties, the lode claimants and the United States. were parties to the proceedings and were estopped by the judgments and the patents. One of them was not a party to any of these proceedings, to the judgments or to the patents, and, upon familiar principles; was neither bound by them nor estopped by them from presenting and proving according to the established rules of evidence in trials under the common law the fact that no discoveries had been made on the lode claims before the location of its tunnel site, the fact essential to the validity of its claim upon, and interest in, the land.

Not only was the claimant of the tunnel site not a party to the proceedings in the Land Department which resulted in the entries and patents to the lode claims, but it was neither required to become such a party nor to submit its claims and interests in the lands to the adjudication of that department at that time because its rights therein were then too uncertain, contingent and intangible for determination. When the applications for the patents of the lode claims were filed, the blind veins which have induced the use of the tunnel

through the lands in controversy had not been discovered, the tunnel had not been driven into the land, and it was impossible to know whether or not the claimant of the tunnel site would ever acquire any right to use this land for the purpose to which it is now devoted. The claimant of a tunnel site is not required by sections 2325 and 2326, Revised Statutes, to file an adverse claim and submit his rights in the lode claims crossed to adjudication by the Land Department upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent and intangible. Enterprise Min. Co. v. Rico-Aspen Min. Co., 167 U. S., 108, 112; Enterprise Min. Co. v. Rico-Aspen Consolidated Min. Co., 13 C. C. A. 390, 399, 400; 66 Fed., 200, 209, 210.

2. The issue whether the discoveries in the lode claims were made before the location of the tunnel site in the Ajax Gold Mining Company's case was necessarily considered and adjudged by the Land Department when it permitted the entries of the lode claims. The finding that such discoveries had been made before the date of the entries was indispensible to the decision that the lode claimants were entitled to make the entries so that that finding must have been made by the Department. But the location of the tunnel site in that case was subsequent to these entries. Hence the finding that the discoveries were made before the entries was necessarily a finding that they were made before the location of the tunnel site, and it was, as we have seen, binding upon the

claimant of the tunnel site, because it was claiming a right initiated after this adjudication under a party to the judgments.

It is not so in the case before us. The question here is whether or not discoveries were made in the lode claims prior to January 13, 1902, the date of the location of the claim to the tunnel site. The determination of this question was neither indispensible nor material to the adjudication made by the Land Department on August 5, 1892, that the lode claimants were entitled to enter the land, and there is nothing to show that this issue was ever considered or decided by that department in reaching its conclusion. The only question relative to the discoveries that it was required to determine was whether or not they had been made prior to August 5, 1892, when the entries were permitted, and the decision of that question left entirely untouched the issue in this case whether they were made before or after the location of the tunnel site on January 13, 1892.

3. When the entries were made in the Ajax Gold Mining Company's case no claim to a tunnel site had been located or staked upon or across the lode claims, and the entries of them and the patents to them vested the title in the claimants free from any right or claim to a tunnel site.

It is otherwise in the case at bar. The claim to the tunnel site was located and staked out across these lode claims before they were entered. Under the Revised Statutes and the law the entries and patents of these claims vested the title to them subject to the rights of the prior claimant of the

tunnel site just as they vested it subject to the right of an owner of an adjoining lode claim to follow on its dip through a side line and through the patented territory of these lode claimants any vein which has its apex in his claim. Enterprise Min. Co., v. Rice-Aspen Consol. Min. Co., 13 C. C. A., 390, 400; 66 Fed., 200, 210; Mining Co. v. Campbell, 135 U. S., 286, 301; Hall v. Mining Co., Morr. Min. Rep. (3rd ed.), p. 282; Branagan v. Dulaney, 8 Colo., 408, 412; Lee v. Stahl, 9 Colo., 208, 210; Morgenson v. Milling Co., 11 Colo., 176, 179.

While, therefore, it is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests, it is no such attack to assert the rights of the claimant of a tunnel site located before the entry of the land against a patent of it to a lode claimant, because under the statutes and the law such a patent always issues subject to those rights.

Notwithstanding all these considerations, counsel for the plaintiff insists that the defendant is estopped from pleading and proving that no discoveries of mineral in place were made in the lode claims before the location of the tunnel site on January 13, 1892, because certificates of location of the lode claims were filed on January 2, 1892, which declare that such discoveries were made on that day, and it is a well-settled principle that patents relate back to, and take effect upon, the dates of the initiation of the rights on which they are founded.

But the certificates of location are not conclusive proof of the facts which they recite against those asserting rights adverse to their makers. They are competent evidence of the fact that they were made and filed, and hence of an important link in the chain of the plaintiff's title. But when the existence of the facts which they recite is challenged they are but the *ex parte* statements of interested parties, and there is nothing in them or in their relation to the property or the parties to bind those claiming the lands adversely to their makers or to estop them from establishing the truth by the customary oral and written evidence.

Nor is there anything in the doctrine of relation to work such an estoppel. Grant that the patents relate back and take effect as of the date of the initiation of the lode claims, yet since the patents are subject to the rights of the claimant of the tunnel site when they are issued they are still subject to those rights when they have related back to the inception of the claims upon which they rest.

Moreover, the averment of the defendant is that no discoveries were made in the lode claims until after the location of its claim to the tunnel site. If this allegation is true, it may be doubted whether the lode claims can be said to have been initiated before the claim for the tunnel site was located. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. Stat., Sec. 2320; Enterprise Min. Co. v. Rico-Aspen Min. Co., 167 U. S., 108, 112. It is true that subsequent

discoveries may validate earlier locations and that the latter may then inure to the benefit of the locators as against the United States and all parties whose claims were initiated subsequent to the discoveries. But they would inure to their benefit as of the dates of the discoveries and not as of the dates of the locations and they would neither destroy nor affect intervening rights. The marking of boundaries and filing of location certificates may precede discovery or discovery may precede them, but no location is valid until both are complete. The earlier act then inures to the benefit of the locator as of the date of the latter, subject to all rights which have intervened between them. Erwin v. Pergo, 35 C. C. A., 482, 485; 93 Fed., 608, 611; Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed., 666, 676; 4 Morr. Min. Rep., 411, 423; North Noonday Min. Co. v. Orient Min. Co., 1 Fed., 522, 531; Zollars v. Evans, 5 Fed., 172, 175; Strepy v. Stark, 5 Pac., 111, 114; Thompson v. Spray, 72 Cal., 528, 533; Erhardt v. Boaro, 113 U. S., 527, 536. There was, therefore, no valid location of the lode claims until the discoveries within them were made and it is held by the Circuit Court of Appeals of the Ninth Circuit in Last Chance Mining Co. v. Tyler Min. Co., 61 Fed., 557, 565; 9 C. C. A., 613, 621, that a patent for a mining claim only relates back to the time when a valid location was first made. If this is a correct view of the law, the patents in this case could not relate back to a time anterior to the dates of the discoveries, and if those were subsequent to the

location of the tunnel site they could not affect defendant's rights.

If litigation for the possession of the property in controversy in this action had arisen between the lode claimants and the claimant of the tunnel site at a time prior to the entries of the lode claims, the question whether or not discoveries of mineral in place had been made in the lode claims before the location of the tunnel site would have been decisive of the issue, and the testimony of witnesses who knew the facts and other evidence competent in the customary trials of such issues at law would have been admissible to determine the question. What is there in the entries and the patents to deprive the defendant of its rights to try this issue now upon like evidence? Its claim to this land had attached before those entries were made. It was not a party to the proceedings in the Land Department which resulted in the adjudication that the lode claimants were entitled to enter it. It was not required to file an adverse claim and to submit its rights to the adjudication of that department when the applications for the patents were made. The adjudication of the Land Department which permitted the entries was *res inter alios acta* and ineffectual to estop the defendant. The Department was not required to determine, and it did not decide the question here at issue, and under the statutes and the decisions of the Federal courts the entries and the patents were made subject to the rights of the claimant of the tunnel site which had attacked before the Land Department permitted the entries. Our answer to

the question which this case presents is, that when the claim to a tunnel site has been located before the entry of conflicting lode claims, which have subsequently passed to patents, the question whether discoveries of mineral in place were made in the lode claims before or after the location of the claim to the tunnel site was perfected is open to determination by means of the testimony of witnesses and other competent evidence *de hors* the patents in any litigation between the parties involving their conflicting claims, Last Chance Min. Co. v. Tyler Min. Co., 61 Fed., 557, 565-7; 9 C. C. A., 613, 621-623; Champion Min. Co. v. Consolidated Wyoming Gold Min. Co., 75 Cal., 78; Iron Silver Min. Co. v. Campbell, 135 U. S., 286; Davis' Adm'r v. Weibold, 139 U. S., 507.

The averments that no discoveries of minerals in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant, and its evidence to sustain them should have been received. The question which has been considered is decisive of the issue whether or not the judgment below should be affirmed, and, as the other questions presented by the assignment of errors may not arise again, they will not now be considered. The judgment below must be reversed and the case remanded to the court below with directions to grant a new trial, and it is so ordered.

CHARLES J. HUGHES, JR.,

Attorney for Respondent.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 219.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY,
Petitioner,

vs.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY,
Respondent.

Certiorari to the United States Circuit Court of Appeals. For the Eighth Circuit.

BRIEF AND ARGUMENT ON BEHALF OF THE RESPONDENT, THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY.

STATEMENT.

In addition to the statement contained in the brief for petitioner, and in addition to some important corrections therein, which it is necessary to make in order that said

statement may conform to the record in important particulars, the respondent makes the following:

The respondent, defendant in the Circuit Court, in its answer, defended upon the grounds that its tunnel site location was superior to the alleged lode mining claims locations relied upon by the plaintiff in this: that while the petitioner, plaintiff below, alleged that its lode mining claims had been located on January 2, 1892, they were not in fact at that time located, nor was a discovery or location thereof, made until after the location of the respondent's tunnel site; that the petitioner and its predecessors had allowed the respondent, a tunnel company, under a claim of right openly manifested and well known to them, to expend over $125,000 in the development of its property in the matter of running its tunnel, and to pass through the lode claims claimed by the petitioner, having at all times full knowledge of the acts of the respondent, of its claim of right, its possession and entrance into said ground through the bore of its tunnel, and the large expenditure which it was making in reliance upon this right, and made no objection thereto, but in fact consented and acquiesced therein until after the expenditures had been made and until after the discoveries of the blind lodes had been made by the respondent through the extension of its tunnel in accordance with the provisions of Section 2323, U. S. Revised Statutes, and were therefore estopped from setting up or claiming that respondent had been guilty of a trespass, and from denying a right of way to the plaintiff in error through its said tunnel, or to prevent the use thereof in its further extension and in the operation of its mining working upon the veins cut therein; that the owner of a tunnel site location made under Section 2323, U. S. Revised Statutes to a lode mining claim on the line or the bore of the tunnel, and which had discovered, in accord-

ance with the Statutes of the United States, certain blind lodes upon the line of the tunnel, and by means of the extension thereof, had a right of way through any intervening lode claims, especially those legally discovered and located after the location of the tunnel site, for the purpose of development and mining in and upon the veins so discovered, located, and owned by it upon the line of its tunnel; that the date of the location, and the date of discovery and patent of lode mining claims, which are not a part of, or disclosed in and by the patent, are in no manner established by the patent, and that although a patent may relate under the circumstances of a particular case to the date of the location or the date of discovery, yet when such date is not disclosed by the patent, it must be established by proof *aliunde* the patent, and this may be done by either party to the action when they have not been the contesting parties in an adverse suit, or under the law were not required to be parties thereto. The facts set forth in the answer upon which these positions were based, are set forth in detail and are well pleaded. Upon motion, these facts were stricken from the answer, and at the trial evidence offered in support thereof was excluded. Thereupon three leading, material and comprehensive errors appeared in the record, were set up and relied upon:

First—The error in relation to the defense of estoppel which was pleaded in the sixth paragraph of the answer to the plaintiff's complaint (printed record, page 38); also in paragraph fourteen of the answer (printed record, page 40). An offer was made to prove knowledge and acquiescence by the petitioner to the acts alleged to constitute an estoppel in connection with the expenditures, claims and assertions of title of the respondent, but the same was, upon objection of the petitioner, excluded (printed record, page 88). The respondent presented to the Court its claims as

to said estoppel in a request for an instruction known as "Defendant's Instruction No. 1," set forth at page 144, printed record, which instruction was refused. To these several actions or rulings of the Court, proper exceptions were reserved.

Second—The error in relation to a right of way to the tunnel site is disclosed and fully manifested at page 89, printed record, paragraphs 10 to 22 of the answer (printed record, pages 59 to 69); in the offer of testimony (printed record, pages 85-89).

Third—The error in reference to which a date in a patent might relate is set forth in the pleadings (printed record, page 58), and with reference to the offer of testimony in support of the allegations of the answer (printed record, page 86), and as to the instruction asked based thereon (Instructions No. 2 and No. 3, printed record, pages 144-5).

The controversy at the trial and presented to the Circuit Court of Appeals was between the locator of a tunnel site with all the appurtenant rights thereof, in pursuance of Section 2323, U. S. Revised Statutes, and the owner of patented lode mining claims lying within the boundaries, as defined by statute, of the tunnel site location. The alleged rights of the petitioner, and upon which it relied at the trial, are claimed to have been obtained by virtue of a United States patent for the Ocean Wave and Little Mary lode mining claims, dated December 21, 1893. The rights of the respondent are based upon the location of the Uinta Tunnel site, located on the 13th day of January, A. D. 1892, and by virtue of a full and complete compliance with the Statutes of the United States and of the State of Colorado, and of all rules and regulations and requirements having reference to the location, maintenance and development of tunnel site locations. Petitioner's patent, though

issued on December 21, 1893, was based upon an entry for patent the 5th day of August, A. D. 1893, which fact appeared in and by the patent. Petitioner claims that this patent related necessarily and absolutely to the date of the alleged original location of the Ocean Wave and Little Mary lode mining claims, claimed to have been made on the 2d day of January, A. D. 1892, eleven days prior to the location of the tunnel site. There was no controversy as to the fact that the tunnel site was duly, properly and legally located on the 13th day of January, A. D. 1892, or that all work required by the statute and all requirements of the laws and regulations either of the United States or of the State of Colorado, or the mining district in which the same was located, had been fully and completely performed and made with reference to the tunnel, and that the respondent was at the time of the trial in possession of all rights which belonged or could belong by virtue of the statutes of the United States and the State of Colorado, to a tunnel site location and to a tunnel located in strict conformity with the provisions of Section 2323, U. S. Revised Statutes. The tunnel had been maintained with diligence and in the actual possession of the respondent and its grantors from the date of its location to the date of the trial, and was then a valid existing tunnel site. After the location of the tunnel site, and during the progress of the extension of the tunnel and work thereon, the following blind lodes, or lodes not outcropping at the surface, were discovered in the tunnel, and location thereof properly and legally made in accordance with the requirements of the United States Statutes and Statutes of the State of Colorado, and the local rules and regulations of the mining district in which they were situate, to wit: Uinta Tunnel No. 23, on the 18th day of December, 1897; Uinta Tunnel No. 24, on the 23d day of January, A. D. 1897; Uinta

Tunnel No. 25, on the 6th day of January, A. D. 1898; and Uinta Tunnel No. 26, on the 5th day of December, 1898. The location certificates for these several locations relate back in date to the location of the tunnel site, and as set forth in the printed record, page 138. After making the offer to prove by competent testimony the discovery of these several blind lodes Nos. 23, 24, 25 and 26, the location certificates thereof were offered in evidence (printed record, pages 131-6). The respondent also was the owner of an unpatented lode mining claim called the Black Jaspar, located on the 30th day of January, A. D. 1897 (printed record, page 140). Respondent offered to prove said location by competent evidence, which said evidence was excluded upon the objection of petitioner, as will be found fully set forth in the record. (Printed record, pages 79 80, 81, 85).

The claims of the petitioner lie between the portal or entrance of the tunnel and the breast thereof, between the portal of the tunnel and the blind lodes Nos. 23, 24, 25 and 26, and the Black Jaspar, owned by the respondent, and beyond the line of the bore of the tunnel. It is claimed by the respondent, and expressly pleaded in its answer, that the alleged discoveries claimed to have been made on The Little Mary and Ocean Wave lode claims, and which constituted the origin and basis of all title thereto, were not in fact made until long after the location of the Uinta Tunnel Site, and that the claim of the petitioner that these lode mining claim locations were prior in point of time, or superior in matter of right to the location of the tunnel site, is not true, but that on the contrary no location thereof was made and no discoveries thereon until after the location of the tunnel site, and that hence the tunnel site is in fact prior in point of time of location to the date of the location of the lode

claims, and both thereof, and was therefore as a matter of law, superior thereto, and under the conditions existing at the time, that the petitioner applied for and received patent, the owner of the tunnel site was not required or permitted under the law to adverse the same, and is in no wise concluded by the issuance of that patent as to any matter in conflict between the two, and especially is not estopped or concluded so that the petitioner may introduce evidence as to the date of the location of said lode mining claims and have the patents relate back to said date, while at the same time there shall be excluded the offer of evidence and the filing of pleadings on behalf of the respondent denying the priority of the discovery and location, and proving that instead of the location of the lode mining claims having been made prior to the location of the tunnel, the exact reverse is the case.

The Circuit Court of Appeals, on a hearing of this cause, and after a full presentation of the respective claims of the petitioner and respondent, held against the contention of the petitioner and the construction sought by it to be put upon the position of this Court in the case of Calhoun G. M. Co. vs. The Ajax G. M. Co., 182 U. S., 491. The decision of the Circuit Court of Appeals is reported in 119 Federal, 166 and is set forth in the printed record herein at pages 178-185.

ASSIGNMENT OF ERRORS.

The four assignments of error presented by the petitioner, and set forth at pages 9-10 of its brief, do not in fact assign errors upon things really done by the Circuit Court of Appeals, but contain arguments with reference to the positions alleged to have been taken, and decisions al-

leged to have been made by the Circuit Court of Appeals, but which in fact were not taken or made. They contain sweeping assertions to the effect that the Circuit Court of Appeals has rendered a decision in violation of the decision of this Court in the Calhoun-Ajax case, and the unnamed decisions of this Court construing Sections 2322 and 2323, U. S. Revised Statutes. An examination of each of these alleged assignments of error will find that it is either an accusation or an argument, and in no wise an assignment of error or presentation of the real decision of the Court below and the claim of error as to the same. They are in effect, we maintain, perversions of the facts with which the Circuit Court of Appeals dealt in its decisions and of the decision actually rendered. It is contended in petitioner's brief as a summary of the various alleged errors complained of, that the Circuit Court of Appeals refused to accept or apply the decisions of this Court, and announced and applied a doctrine in conflict therewith, whereas, in fact in a clear, luminous and conclusive exposition of the controversies of that case, and application of the principles of law as announced by this Court pertinent thereto, that Court demonstrated that its decision was in no wise in conflict with the decisions of this Court, but was in perfect harmony therewith.

It is true that Judge Sanborn, speaking for the Court, pointed out what he claimed to be, and what is, a fundamental distinction between the case at bar and the Calhoun Company vs. Ajax Company, to wit: that in the case last mentioned, the tunnel location of the Calhoun Company was made after the entry, and substantially the patent of the Ajax lode mining claims had passed, when the territory had ceased to be public domain, and was no longer subject to location as a tunnel site, while in the case at bar, a tunnel site location was, as shown by the portions of

the answer, stricken out, and by the evidence offered, senior in time and prior in right to the lode mining claims, located, and had been located, not only before any title or right of any kind had been initiated upon the same, but while it was unoccupied public domain subject to location under the tunnel site statutes. Counsel for petitioner, throughout the brief they have filed, constantly assert that the lode mining claims were first located, and that the Circuit Court of Appeals, in its decision, ignored this fact. The exact reverse is the situation. It is a rule without conflict of authority, that in determining the effect to be given to a pleading, to an offer of testimony, and whether they shall be accepted or rejected, it is to be assumed that the allegations of the pleading are true, and that the evidence will establish the facts in accordance with the offer. It having been pleaded by the defendant that its tunnel site location was made prior to the lode location, it being denied in the answer that the lode locations were made prior to the tunnel site location, in determining the materiality and sufficiency of these allegations, it must be taken as true as a matter of fact that the tunnel site location was prior in date of location and superior in matter of right to the date of location and the rights of the lode mining claims. The same position must be accepted as true with reference to the effect, correctness and force of the offer to introduce and the exclusion of evidence. The position of the respondent and the determination of the Circuit Court of Appeals was not that in a case wherein lode mining claims had been properly and legally located, so that they were valid and in full force and effect at the time of the location of the tunnel site, and thereafter a patent for the lode mining claims had been duly issued, the patent would not upon the establishment of these facts, by proper testimony relate to the location, the real substantial

location of the claims. That question was not the question presented and determined. The petitioner alleged in its complaint (printed record, page 34), that the lode claims were located on the 2d day of January, 1892. It alleged that its patent was issued on the 2d day of December, 1893, and that entry had been made on the 5th day of August, A. D. 1893 (printed record, pages 34, 92, 94 and 127). These allegations were put in issue. There was nothing in the patent to show that it related back to a date earlier than August 5, 1893. The petitioner undertook to extend the patent and to secure the operation of the equitable doctrine of relation, to the destruction of the rights of the respondent, by proving *aliunde* the patent, that in fact the lode mining claims had been located on the 2d day of January, 1892. The petitioner did not believe, nor rely upon the claim that in and by the patent itself, the date of location was established and established so conclusively that it should not be the subject of inquiry or evidence. It alleged a location and sought to prove it, offering evidence utterly inadequate and insufficient for that purpose under multiplied decisions upon the subject. The respondent undertook to meet this allegation and this inadequate proof by the answer to the effect that the location was not made at the date alleged, and that a discovery which is the essential element and primary basis of every location, as provided by the statutes of the United States, and held by this Court, was not in fact made until long after the location of the tunnel site, and therefore, under the rule relative to the doctrine of relation, the patent could not relate back to January 2d, nor to any time prior to January 13, 1892, the date of the tunnel site location.

It is to be observed that the tunnel site location, as it is pleaded by the respondent, and as would have been established by the evidence offered in support thereof, was lo-

cated in such a way as to be superior to any claim or right not existing at the time of its location or arising during its extension; and that in the progress thereof, blind lodes were discovered, to the possession of which it became entitled, and the ownership of which became vested in it; and that the claim of the petitioner is, that if A. locates a tunnel site and pursues the work thereon in complete compliance with the statutes governing the same, but should not in the first four or five hundred feet thereof discover blind lodes, but should discover them further in upon its tunnel, and at a depth of thousands of feet from the surface, rendering it impractical to operate or mine the same save through the tunnel, and if B. should locate lode mining claims thereafter across the bore of the tunnel and between the portal thereof and the position of the blind lodes, and apply for patent which, since no lodes had been discovered within that portion of the tunnel crossing these lodes, A. would not be permitted or required to adverse; and when a patent should be issued therefor, it would be assumed to be superior and anterior in initiation of right to the tunnel site location, and instead of the lode mining claims being taken and held subject to the right of way for the tunnel, that the tunnel would as to this territory, become the property of B., who would thereupon dismember the right of A. in his tunnel and prevent the use thereof. In other words, that the tunnel right, though prior and perfect, is absolutely as to every part thereof in which a blind lode is not located and discovered thereby invalidated; that if after its initiation and during its progress, and while it is perfect in its legal force, someone makes a lode location across the course of it, and so makes it that the owner of the tunnel is neither authorized nor permitted by adverse proceedings to challenge the right, the tunnel rights are destroyed. Authority from the letter or spirit of the statute, or by the

terms of any decision will be sought in vain establishing this inequitable and unjust result.

Recognizing the necessity of putting the case in a different position from that which it occupied before the Circuit Court of Appeals, and of removing the foundation for the flawless logic of the Circuit Court of Appeals resulting in a reversal of the case, counsel have taken issue with that Court as to certain allegations stated by Judge Sanborn in delivering the opinion of the Court to be contained in the answer. This is a matter of importance; is the subject of frequent remark and assertion by counsel, and is, it may be said, controlling in its effect. We therefore inquire as to who is correct, counsel or the Court, in this dispute. Judge Sanborn in the opinion has said:

"When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question, whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site, open to determination by means of evidence or testimony *de hors* the patents? This is the principal question presented by this record.

* * * * * * * *

119 Fed., 166.

"This is not the case in the action before us. The claim to the tunnel site was located on January 13, 1892. The judgments of the Land Department allowing the entries were rendered on August 5, 1892 ('93). At that time there were three parties interested in the land—the lode claimants, the United States and the claimant of the tunnel site. Two of these parties, the lode claimants and the United States, were parties to the proceedings and were estopped by the judgments and the patents. One of them was not a party to any of these proceedings, to the judgments or to the patents and, upon familiar principles, was neither bound by them nor estopped by them from present-

ing and proving according to the established rules of evidence in trials under the common law the fact that no discoveries had been made on the lode claims *before the location of its tunnel site,* the fact essential to the validity of its claim upon, and interest in the land.

* * * * * * * *

119 Fed., 168.

"The question here is whether or not discoveries were made in the lode mining claims prior to January 13, 1892, the date of the location of the claim to the tunnel site.

* * * * * * * *

"Notwithstanding all these considerations, counsel for the plaintiff insist that the defendant is estopped from pleading and proving that no discoveries of mineral in place were made in the lode claims before the location of the tunnel site on January 13, 1892, because certificates of location of the lode claims were filed on January 2, 1892.

* * * * * * * *

119 Fed., 169.

"Moreover, the averment of the defendant is that no discoveries were made in the lode claims until after the location of its claim to the tunnel site.

* * * * * * * *

"The averments that no discoveries of mineral in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant and its evidence to sustain them should have been received."

119 Fed., 171.

Counsel for petitioner, in their brief referring to the statement of Judge Sanborn, last quoted, say, at page 14:

"There is no such averment in the answer, either as originally filed or as subsequently reformed through the motion to strike, as mentioned by the Court."

And at page 15:

"That part of the affirmative answer, upon the allegations of which an affirmative judgment was prayed by the respondent, makes no reference to the petitioner's location or discovery, but pleads its own title to the tunnel and to the veins discovered therein, together with a right of way through petitioner's mining claims under the Federal and State Statutes for the operation thereof."

Page 16:

"It is possible that if the answer had contained a general denial of the allegations of the plaintiff's complaint, a liberal construction would have justified the statement quoted from the opinion; but even that, as we have seen, is absent from the answer. As a question of pleading, therefore, and without reference to any other consideration, testimony concerning the want of discovery in the plaintiff's claims was properly rejected."

Page 30:

"His Honor, again misquoting the averments of the respondent, 'that no discoveries were made in the lode claims until after the location of its claim to the tunnel site,' argues that 'if this allegation is true, it may be doubted whether the lode claims can be said to have been initiated before the claim to the tunnel site was located,' and then cites a number of authorities in support of the proposition that there can be no location of a mining claim until the discovery of a vein within its limits. The 'allegation' can not be true, because the averment does not appear in the pleadings, * * * and the argument of the Circuit Court of Appeals again fails."

To ascertain which is right in this dispute, court or counsel, we appeal to the record and quote:

Printed Record, page 37:

"It further alleges that said Ocean Wave and Little Mary Lode mining claims were not, nor were either of them, located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered or uncovered

in the discovery shaft of said Ocean Wave Lode mining claim or of said Little Mary Lode mining claim."

Printed Record, page 48:

"Twenty-first. It further avers * * * that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made, said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the Statutes of the United States and of the State of Colorado which authorize and provide for the location and prosecution of such tunnel, and which defines and determines the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta Tunnel, located in accordance with Section 2323, U. S. Revised Statutes," etc. * * *

From which it appears that Judge Sanborn is correct as to his statement of what was averred in the pleadings, and counsel are mistaken, and have based the major part of their contention and their assault upon and criticism of the decision of the Circuit Court of Appeals, upon their misapprehension of or failure to read a portion of the answer with which it is apparent that Judge Sanborn was quite familiar.

It is almost impossible, and we apprehend would be an utterly useless task, to pursue in detail through the brief of counsel for petitioner the statements of what it is alleged was decided by the Circuit Court of Appeals, what was assumed by that Court, and the alleged action of that

Court in holding that a junior tunnel site location could assail and invalidate a patent for prior located lode mining claims. A little mental paralleling of the real utterances of the Circuit Court of Appeals and the assertions of counsel for petitioner as to what those rulings were, will disclose the misapprehension of that decision, which has controlled and excited counsel in the preparation of their brief. May we not suggest that it is demanding no more than is proper to ask counsel when they make the decisions of the Court the target of their wit, their satirical shafts, and their condemnation, to first read and know what the Court has in fact said and decided? In the present instance it would seem that had such a course been pursued, counsel would have at once recognized that the decision of the Circuit Court of Appeals was eminently proper, whatever might be their opinion of that imaginary decision which the vivid fancy of counsel has created, and which they have presented to this Court for its consideration.

THE PATENT.

For the purposes of this brief and argument, we shall discuss first, the force and effect of the patent under consideration, its conclusiveness, and the date to which the same under the authorities relates, and the testimony by which that date is to be established, and which on behalf of the respondent may be introduced for the purpose of its ascertainment. These are the paramount and engrossing questions presented by this record, and if the contentions of counsel for the respondent are correct, are conclusive and determinative of the matters brought here upon this *certiorari*.

The contentions and views of counsel for the respondent cannot be better or more simply expressed than by presenting them in the concrete form they assume in instructions numbered 2 and 3, requested by the respondent at the trial of the cause, and which upon the objection of the petitioner, and over respondent's exception, were refused. They are as follows:

"The Court instructs the jury as a matter of law, that there can be no location of a mining claim upon the public domain until there has been a discovery of mineral thereon. The simple driving of a location stake, the marking of the claim, upon the ground, the survey making a location certificate and recording the same, is not sufficient. Until a vein in rock in place has been discovered. there is no valid discovery and no valid location can be made until such discovery. If the jury believe from the evidence in this case that the plaintiff or its grantors, had not made a discovery of mineral in its Little Mary and Ocean Wave lodes, prior to the location of the tunnel claimed by defendant, and you further believe from the evidence that the said tunnel, from the time of its location was being prosecuted with reasonable diligence, and that there was no failure to prosecute work on the tunnel for a period of six months, until after defendant was enjoined from working its said tunnel; that the work on said tunnel was continuous, then and in such case you will find for the defendant.

"If the jury believe from the evidence that there was no discovery of a vein of mineral in rock in place, made in the Little Mary and Ocean Wave lodes, or either of them, until after the location of the tunnel claimed by defendant, then and in such case it was not necessary, when application for patent for said Little Mary and Ocean Wave lodes, or either of them, was made for the owners of the tunnel, if such owners had not at that time reached the westerly side line of the Little Mary with the bore of its tunnel, to file an adverse claim in the United States Land Office and to commence a suit in support thereof to preserve the rights of such owners to the said tunnel."

The petitioner's position at the trial, which was adopted by the trial court, may be summarized thus: The Ocean Wave and Little Mary are patented claims, the patent for which bears date December 21, 1893, but for the purpose of determining the rights of the parties hereto, relates back to the original location, which it is claimed by the petitioner is January 2, 1892, and this fact is proved by the introduction of the location certificate of the two claims and the amended location certificates thereof, which were offered and admitted in evidence. It is to be observed that the patent itself is silent as to the claimed original date of location, but sets forth that entry was made of the claims on the 5th day of August, A. D. 1893. It is not the purpose of counsel for the respondent to contend against the validity or conclusiveness of patents of the petitioner within their proper scope and sphere, or within the well-defined limits of the extent thereof as settled by this Court, and there is probably no better time for us to eliminate from this controversy clearly any doubt as to the position of the respondent on this point. It may be admitted that patents to mining claims cannot be collaterally attacked, that they are within certain limits, which will be hereafter mentioned, conclusive upon all parties thereto, or to the proceeding under which they were issued, or who by intendment of law were parties thereto.

The respondent maintains (*a*), that under the circumstances of this case, it is under, and within the decision of this Court in Enterprise Mining Company v. Rico-Aspen Mining Company, 167 U. S., 104, and was not only under no duty or obligation to adverse the application for patent made by the petitioner for its two lode mining claims, but that it had no right to do so, and was not permitted to do so.

(*b*) That being thus under no duty, and having no right or opportunity to adverse the application for patent

as above stated, the question of priority of location between the lode mining claims and the tunnel site was not adjudicated, was in no manner evidenced or concluded by the patent, and was properly the subject of proof as any other fact, by such testimony as would be proper under the rules of evidence. It may be stated that there are certain locations of lode mining claims made through the instrumentality of a tunnel site location and the extensions of a tunnel thereon, which require that the locator shall institute adverse proceedings against other independent locations or claims, as for instance, where both lode locations cover the same territory, and the one location is based upon the discovery of a blind lode made in a tunnel, and the other upon the discovery of an out-cropping vein upon the surface, it being quite possible that there may be within the boundaries of a claim fifteen hundred feet in length by three hundred feet in width both outcropping and blind lodes. In such a case, should a tunnel lode claimant fail to adverse the application for patent of the out-cropping lode claim, there might be ground for contending that all matters would be concluded between the two in the same manner as though there had been an actual adverse contest.

There are other instances, among which is the one here presented, where it would be a useless, a vain, and an impossible thing for the tunnel site locator to adverse patents for lode claims against which the tunnel claimants at the time of the application for patent either had no adverse rights, or with reference to which they were under no legal or other obligation to present them. In this case there had been within the territory now involved, no discovery of a blind lode in conflict with the claims of the petitioner at the time of the application for patent by the respondent which would have entitled it to file an adverse, nor are the rights here in dispute of such a nature

that had they existed at the time of the application for patent, the tunnel site locator would have been entitled to file an adverse and assert the same. There was no more duty upon the tunnel site locator to file an adverse than there would have been between two lode claimants who, having no conflict of surface area, and knowing of no underground conflicts, respectively apply for their patents and afterwards became involved in litigation over the right to a vein below the point of union when their veins contained in the respective separate locations had united upon their dip. It would be the source of endless, fruitless, and needless litigation if it should be possible or required, that a lode claimant, where there was no conflict of any surface boundaries, upon suspicion that there might in the course of years and development arise a conflict over the union of the veins upon the dip, have the right or be under the duty to enter upon the tedious, expensive, and vain labor of an adverse suit with all of his neighboring lode claims. This question has been authoritatively adjudged in many decisions.

Lindley on Mines, Vol. 2, Sec. 730;

Champion M. Co. v. Consolidated Wyoming M. Co., 75 Cal., 78;

Eureka Case, 4 Sawyer, 302;

Kahn v. Mining Co., 2 Utah, 188;

Last Chance M. Co. v. The Tyler Mining Co., 61 Fed., 557.

That there was no duty upon a tunnel claimant to file an adverse against a lode claimant such as the one here in controversy, before a blind vein had been discovered by the tunnel site locator, has been settled by this Court in Enterprise Mining Company v. Rico-Aspen Mining Com-

pany, 167 U. S., 104. This decision is authoritative, is met by no conflict of authorities, and is amply sustained by the reasoning therein contained and the authorities cited. The decision was rendered by Mr. Justice Brewer. The conflict was between the Vestal lode claim, a surface location, and the Jumbo No. 2, a blind lode discovered in a tunnel, and this latter claim being discovered in point of time later than the Vestal. This Court, with reference thereto, says:

"The remaining question is whether the failure to 'adverse' the application for a patent for the Vestal claim destroyed or impaired the rights of the defendant. We think not. United States Revised Statutes, Sections 2325, 2326, contain the legislation in reference to adverse claims.
* * *

"Now, at the time the application for patent to the Vestal claim was presented and the proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be preceived, runs parallel to the line of the tunnel, and is distant therefrom some 500 feet. The presumption, of course, would be that the vein ran lengthwise, and not crosswise, of the claim as located, and such a vein would not, unless it radically changed its course, cross the line of the tunnel. Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal, was a matter of pure speculation, and there would be no propriety in maintaining a suit to establish defendant's inchoate right and delay the Vestal claimants in securing a patent, on a mere possibility which might never ripen into a fact. The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible, and certain right, and not a mere possibility. Of course, the owners of the Vestal claim had notice, from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develop, and so they were not prejudiced by the failure to 'adverse.' And as the de-

fendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts, and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and therefore nothing lost by a failure so to do."

Take the analogy between the facts set out in this opinion and those in the case at bar, and we may with equal propriety ask, what right was possessed by the respondent in this case, at the time of the application for patent by the petitioner, which would have entitled respondent to institute an adverse proceeding? No blind lode was discovered, a location upon which would in any wise conflict with the patents of the petitioner. The only possible ground upon which it can be contended that there was a duty upon the respondent to adverse, is that, wherever there is a possibility that the rights of two parties will depend upon a priority of location, regardless of the conflicts in territory, it shall be the duty to institute an adverse proceeding for the determination, at the time of the issuance of the patent, of their relations as to priorities.

It is clear that locations may be made subsequent to the location of a tunnel site, and within its boundaries, upon veins which outcrop upon the surface and which are known. A tunnel site can under no circumstances, include or obtain title to such a lode, any more than the owner of a placer can obtain patent to such a known vein without specifically applying therefor. It is excluded by law, and the right to locate thereon is as much granted to the prospectors upon the public domain, as the right to enter upon any open domain of the Government.

(*b*) At page 68 of the Printed Record, in paragraph twenty-first of the respondent's answer, which was

stricken out as a whole upon the motion of the petitioner, it is alleged that at the time of the location of the tunnel site by the respondent, there had not been a valid discovery of mineral in either of the claims of the petitioner, but that said discovery, if any, was subsequent in point of time to the tunnel location.

It is the contention of the petitioner that, by the decision in The Calhoun Gold Mining Company v. The Ajax Gold Mining Company, 182 U. S., 499, the matter of the date of discovery, or of location, is not open for the introduction of evidence or determination, but is concluded by the patent itself. The position of the petitioner upon this point is somewhat contradictory, for, although stoutly maintaining this right by assertion, no reliance is placed upon it, either in the pleadings or in the proof. In the pleadings, in the fourth paragraph of the amended complaint (Printed R., p. 34), the title of the petitioner is based upon the patent to the two claims. But in paragraph fifth (Printed R., p. 34) there is an allegation of fact, which is entirely outside of the patent itself, to wit: that the Little Mary and Ocean Wave claims were located on the second day of January, 1892. At the trial of the case the petitioner was not content to rest upon the introduction of the patent, but as proof of a date to which the patent should relate, introduced the original location certificates of the two claims, and the amended location certificates (Printed R., p. 75). This was done over the objection of the respondent, that the location certificate itself was not proof of a discovery. Did the petitioner load both the pleadings and the proof of the trial of this case, with surplusage, or was there a necessity for both the pleading and the proof in this respect? That there was such necessity cannot be disputed. If it was neces-

sary for the plaintiff to allege, as a distinct matter, the date of the discovery, and to prove the same, it certainly was competent for the defendant to deny such discovery, and, by such proof as it might adduce, to meet any evidence of petitioner in respect to the date of location.

The title by patent issued upon the relocation of a mining claim does not relate back to the original location, if that was invalid; and, when it becomes material, evidence of the invalidity of the original location is admissible for the purpose, *not of impeaching the patent*, but of determining the time to which such title relates.

Fisher et al. vs. Seymour et al., 23 Colo., 542.

There is no doubt that generally the rights of a patentee, to property obtained from the government, relate back beyond the date of the patent. What this time is has been disputed and varies in different cases. Lindley on Mines, Vol. 2, page 975, states the rule as follows:

"It is accepted as a well established rule of law, that the title conveyed by a mining patent relates back to the inauguration of the right; that is, to the location upon which the patent proceedings are based."

Citing as authority therefor:

Haydenfeldt v. Daney G. & S. M. Co., 93 U. S., 634;

St. Louis Smelting Co. v. Kemp, 104 U. S., 636;

Deffebach v. Hawke, 115 U. S., 392, 405;

Silver Bow M. & M. Co. v. Clark, 5 Mont., 378;

Talbot v. King, 6 Mont., 76;

Smokehouse Lode Cases, 6 Mont., 397;

Deno v. Griffin, 20 Nev., 249;

Eureka Case, 4 Saw., 302;

Kahn v. Old Tel. Co., 2 Utah, 174.

Barringer and Adams on the Law of Mines and Mining in the United States, at page 417, state their conclusions as follows:

"The patent being simply the evidence of the grant, when it had been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights, unless they be such that the patentee has lost the right to question them by reason of his failure to file adverse claims, as required by Rev. Stats. 2325. Where such rights exist, the relation is to the date of the issuance of the certificate of entry. The date of location may be stated in the instrument, or may appear in the record of the entry in the department and may be thus established, or it may be otherwise proven.

"Where successive steps are essential to perfect title, as discovery, location, record, application for patent, entry and finally patent; and during the progress of the time required to complete the series two hostile parties have taken some or all of these steps towards obtaining title to the same ground—the doctrine of relation may become material to determine between them the question of priority.

"Where discovery is followed by location and record within the proper or fixed periods allowed and entry and patent follow in due course, the title is considered in general and in theory to relate back to discovery. This theoretical relation is, of course, of no materiality unless a second title has intervened, and if a second title has intervened at a period when the first title was in default, the doctrine of relation does not apply, or rather it favors the second title."

Morrison's Mining Rights (Eleventh Edition) page 129.

"Even if suspected, such union would rarely be provable in time to support an adverse claim, and even if known an adverse claim could not be brought because an adverse is allowed only where there is a surface conflict. —6 L. D. 320. The doctrine of relation back to discovery, therefore, applies, but the date of discovery and of the respective acts of location are open to parol proof. If the union becomes known or comes in contest, as it generally does after both lodes are patented, there exists a presumption in favor of each that it had a valid discovery and location at the date of entry, but there is no conclusive presumption that the date of discovery or of location claimed by the recorded location certificate upon which the patent issued is the true date. St. Louis Co. v. Kemp, 11 M. R., 673; 2 Lindley, Sec. 730; Last Chance Co. v. Tyler Co., 61 Fed., 557."

Morrison's Mining Rights (Tenth Edition) page 149.

Whether, then, the patent, when issued, relates back simply to the date of entry, or to the very origin of the rights of the claimant of the property, is immaterial here to us, though it is different under different circumstances.

In the case of The Calhoun Gold Mining Company v. The Ajax Gold Mining Company, *supra*, which was a case appealed from the Supreme Court of Colorado, and which reversed a long line of decisions in reference to cross lodes, there is an opinion covering some five pages, dealing with rights of the most vital nature, and this Honorable Court, speaking through Mr. Justice McKenna, after determining in favor of the defendant in error in that case upon its contention in reference to crosslodes, makes this statement:

"An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in

two of the patented claims of the defendant in error, to-wit, the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

This is the paragraph upon which, at the trial, the petitioner based its request for a judgment in the present case, and upon which it asks for a reversal of the decision of the Circuit Court of Appeals.

Let it be conceded that patents are proof of a discovery; that patents do relate back to the date of location; that patents cannot be collaterally attacked. On these propositions, as contained in that paragraph, we here make no dispute. But does that paragraph say that the patent is proof of the time or date of a discovery? Does that paragraph mean that the patents relate back to the date of the location, *as shown by the location certificate*, without other proof thereof, and that no other proof can be introduced upon that fact? Does that paragraph mean, when it says that patents cannot be collaterally attacked, that the date of location, when not shown by the patent itself, can not be shown by any other evidence outside of the patent? Unless these questions are answered in favor of the petitioner, the judgment in the Circuit Court of Appeals must stand. Not only would it put a strained meaning upon the words used in that decision, to give them such far-reaching effect, but it would over-ride, not only a prior decision of this Court, to wit: the case of Enterprise Mining Company v. Rico-Aspen Mining Company, *supra*, but it would, without discussion, with no authority, and without the presentation of reasoning therefor, wipe out a line of well established,

thoroughly reasoned decisions, and without any necessity therefor in the decision of the case to the contrary, wherein the question was a pivotal one, where arguments were heard, and the question was determined in the light of its recognized importance. In addition, it would be directly contrary to a learned opinion, rendered by the Circuit Court of Appeals of the Ninth Circuit, rendered by a Court, one of whose members, Mr. Justice McKenna, who writes the opinion in the Calhoun case, *supra*. We refer to The Last Chance Mining Company v. The Tyler Mining Company, 61 Federal Reporter, page 557. This case, upon appeal to this Court, was reversed, but solely upon the question of the admissibility of certain evidence and as to its effect as *res adjudicata*. No criticism is by this Court made upon either the decision or the reasoning of the Circuit Court of Appeals in that case, upon this question of the relation of a patent to the date of discovery. It was a case in which extra-lateral rights were to be determined by priority of location.

Since, as we assert, and as the Circuit Court of Appeals has clearly pointed out, there is a radical difference between the facts of the Ajax-Calhoun case and the case now here for consideration, in essential and controlling matters, the Ajax-Calhoun case must be construed in the light of its own facts, and cannot be applied to the essentially different facts existing in the case at bar. That language may have been employed which might be construed to apply to a case which was not being considered or decided, by ignoring the facts of the case, does not authorize its application thereto, but under the rules announced by this Court we must resort to the facts of the case decided, to get the scope, extent and limits of its application. No Court has made this doctrine so

manifest, applied it more uniformly, or presented with greater precision the doctrine and its reasons, than this Court. Mr. Justice Curtis, in Carroll vs. Carroll, 16 How., 27, states the position of this Court, and which we think is applicable to the discussion now presented, in the following language:

"If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contention belongs. And therefore this Court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens vs. Virginia, 6 Wheat., 399, this Court was much pressed with some portion of its opinion in the case of Marbury vs. Madison, 1 Cranch, 137, 174. And Mr. Justice Marshall said. 'It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of Ex. p. City Bank, 3 How., 292, and Peck vs. Jenness, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied upon as a binding authority,

unless the case called for its expression. Its weight of reason must depend on what it contains."

Northern Bank vs. Porter Township, 110 U. S., 615;

St. Louis R. Co. vs. Terre Haute, 145 U. S., 404;

United States vs. Wong Kim Ark., 169 U. S., 679.

There is no date contained in the patent to the property of the petitioner other than that of the date of entry, the 5th of August, 1893, which is subsequent to the location of the tunnel site; and if the patent is to be conclusive of the date to which it relates, then we submit it must be to the date of entry, and to the 5th of August, 1892. But if the position be taken that it relates back to the actual discovery, and that proof thereof must be made by evidence, then it is only fair and just that this issue may be met by the opposing party, and that the actual date shall be shown. There is in the patent no reference to the certificate of location, nor anything which could make it a part of the patent itself, ~~nor~~ and if it be granted that a patent relates to the date of location, the question must naturally follow, what is the date of location? Is it the filing of the certificate of location? Is it a date which is recited in the certificate of location? Or is it the date of the actual discovery of mineral?

The discovery of mineral, not the filing of the certificate of location, nor the date recited therein, is the inauguration of a locator's rights.

Revised Statutes of the United States, Sec. 2320.

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Lindley on Mines, Vol. 1, pages 433-4;

Barringer and Adams on Mines and Mining, p. 214;

Erhardt vs. Boaro, 113 U. S., 527;

North Noonday Company vs. Orient Mining Co., 1 Fed., 522;

Jupiter M. Co. vs. Bodie Con. M. Co., 11 Fed., 666;

Cheesman vs. Shreve, 40 Fed., 787;

Overman S. M. Co. vs. Corcoran, 15 Nev., 147;

McLaughlin vs. Thompson, 29 Pac., 816.

No rights of any kind whatsoever were vested in the petitioner, until there was a valid discovery in its two claims, the Ocean Wave and Little Mary. No staking, or posting of signs, or recording of location certificates could take the place of such discovery. Only upon that discovery could there be any relation back to such staking or posting; but the initiation of all right, against either the Government or third parties, is upon the discovery and not the staking, posting or recording of the location certificate.

The filing of the location certificate is the last step required under the Colorado Statutes, is in no manner evidence of title, and is only at the time of its filing a notice of a claim and is not proof of anything mentioned or recited therein as having been done, nor of more than its own filing and contents.

Barringer and Adams on Mines and Mining, p. 239;

Cheesman vs. Hart, 42 Fed., 98.

A location certificate is not required by the United States Statutes, nor by the statutes of all the States; but in those States in which it is required, it is *prima facie evidence only* of its own existence and filing.

Lindley on Mines, Vol. 1, p. 502;

2 Jones on Evidence, Sec. 521;

Campbell vs. Rankin, 99 U. S., 261.

Jantzen vs. Arizona Co., 20 Pac. Rep., 93;

Pollard vs. Shiveley, 5 Colo., 309.

Lindley on Mines, page 502, in treating of this question, says:

"Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. * * * While many of the States require the date of the discovery to be stated in the recorded certificate, we do not think that this would be evidence of the *fact* of discovery. A discovery once proven, such a record would, *prima facie*, fix the date. The question of discovery is the most important of all the acts required in the proceedings culminating in a perfected location. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three States (California, Idaho and Montana), the certificate is executed with no solemnity. It is not either acknowledged or sworn to. It is a mere *ex parte* declaration in his own behalf of the party most interested.

* * * * * * *

"The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent. When the locator's right is challenged, he should be compelled to establish by proof outside of the certifi-

cate all the essential facts, without the existence of which the certificate possesses no potential validity."

We are seeking here now the date to which the patent relates. It is claimed that it is the date of location. We have, we believe, shown to this Court that the date of location and the origin of such location, is the discovery of the vein, and not the filing of the location certificate. The authorities are numerous that the location certificate is not the proper evidence by which to prove the fact of a discovery.

It is sought by the defendant in error in this case to make a location certificate conclusive proof of the fact of discovery and of the date of the same. If there be force in the rule that such certificate is *prima facie* proof, then, by the very meaning of the words *"prima facie,"* the respondent was entitled to introduce evidence to rebut it, and all evidence upon this point was excluded, over the objection and exception of the respondent by the trial Court. While some degree of sacredness has clung around the patents of the United States, limited, however, by the well considered decisions, in which it has been stated that wherever the United States has issued a patent, without jurisdiction, the patent is of no more validity than any other instrument which confers no rights, we know of no sacredness which clings around a location certificate, made, as has been suggested, by a learned author on mining laws, without any solemnity, an *ex parte* act, made by a party who is the most interested one in the entire course of the location. It would be an absurdity if litigation, in which property of great value is involved, should be determined by the *ex parte* acts of the man who is most interested himself; and that, too, at a time when there was no controversy and no reason to controvert in any manner the facts as set out in the location certificate.

The patent is conclusive only of those facts which are necessary in order to procure its issuance. It is not conclusive of any fact which the Land Department is not called upon to pass on. Without *a* discovery, it would be an impossibility for the Land Department to issue a patent. But the *time of discovery* is not made an essential element in the issuance of it, and cannot therefore be concluded by the issuance. The time of location and the time of discovery is not essential to the issuance of the patent, and is not concluded thereby. As to discoveries made subsequent to a location, while they validate the claim and date back the location, they expressly do so provided no adverse rights intervene.

Morrison's Mining Rights (10th ed.), page 29, and cases cited.

Lindley on Mines, Vol. 1, page 454 and note.

In other words, a patent does not live or die with the location, which is set out in the original application as being the date of discovery. But if discovery is made in the claim at any time before the application for the patent is passed upon and such discovery is proven, a patent may issue therefor, provided the rights of intervening locators are taken care of. So in this case, it is not necessary that this patent relate back to the original date of location, as set out in the certificate of location, in order to give effect to the patent. A patent may live and continue to have force with a date set for the actual discovery of the claim very different from that which is contained in the certificate of location. The question is, after all, one of jurisdiction. A judgment can never in effect exceed the jurisdiction of the Court. If by law the Land Department, which is given the power to issue such patents, has

no right or power to determine the time of location, and if, as in the case of the St. Louis Smelting Company vs. Kemp, 104 U. S., 636, the law is as follows: "Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of the party resisting it to show, if an entry is not stated in the instrument, that no entry of the land is made as an initiatory proceeding;" then we can not escape the conclusion that it is not in contravention of any doctrine of conclusiveness regarding a patent, were a party resisting it to show the date of discovery, and to hold otherwise would be to violate that decision of the Supreme Court.

The doctrine of relation is an equitable one, and will only be applied by a Court of Equity in furtherance of justice to all parties. If our contention is correct, that we are entitled to invoke the law of estoppel against one who knowingly sat by and saw the ~~plaintiff in error~~ Defendant expend upwards of one hundred and twenty-five thousand dollars in the improvement of its property, and under the claim of a right to go through the property belonging to the defendant in error, and made no objection, but acquiesced therein, this is certainly an equity in itself, which may be invoked in favor of the plaintiff in error.

The Circuit Court of Appeals, in Evans vs. Durango Land and Coal Company, 25 C. C. A., 532, referring to this equitable doctrine of relation, said:

"It may be conceded that a patent for public land, has, on several occasions, been held to take effect as of the date of the initial step taken by the patentee, under the laws of the United States, to obtain a title to the land. * * * Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully consummated by the payment of the purchase money, or by the doing of

some other equivalent act, such as the surrender of a land warrant, or the selection of land to supply an ascertained deficiency in a land grant. * * * The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin, and designed to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect."

Gibson vs. Chouteau, 13 Wall, 100;

Newhall vs. Sanger, 92 U. S., 766;

Redfield vs. Parks, 132 U. S., 249;

Hussman vs. Durham, 165 U. S., 148.

Small vs. Westchester Fire Ins. Co., 51 Fed., 795;

Hankins vs. Harlan, 68 Cal., 238;

Grant vs. Iowa Land Co., 54 Iowa, 677;

Ellis vs. Pomeroy & Co., 1 Wash., 576.

While petitioner's brief appears to rest its case largely against the Circuit Court of Appeals, upon the claim that the Circuit Court of Appeals held that a junior tunnel location could annul the patent issued for a prior lode location, it manifests some doubt as to the accuracy of this accusation, and seems to consider it necessary to reform this contention, by adding thereto one ingeniously, if not soundly or plausibly, invented for the purpose, and asserts that the entire claim is for a right of way through these lode claims for the tunnel, and this, too, when no blind lodes were found or claimed to have been found therein. This leads to an inquiry as to what rights a tunnel site location has, and upon what they depend. There is no provision in the statute that in order to hold a portion of the tunnel, and to the extent that it may be

excavated, a vein must be discovered therein, or within any given distance therein or from the portal, or that as to the portion thereof not containing or disclosing a blind lode the tunnel is open to location, or the locator loses all his rights therein. The contention of petitioner amounts to this: that while the tunnel right is granted as an entirety, and the right of exploration by means of the tunnel and the ownership and use thereof, is for three thousand feet from its portal, yet if at any time it appears that a blind lode has not been discovered in any part or portion thereof, all title to the tunnel, all right of use thereof, is lost. A test of the propriety of this contention is presented in ascertaining its natural and direct effect. A. locates a tunnel site, extends his tunnel in for a thousand feet, finds blind lodes crossing his tunnel at regular intervals of four hundred feet, in a state in which lode mining claims cannot, as in Colorado, exceed three hundred feet in width. B., relying upon the doctrine of petitioner's counsel here, locates a piece of ground across the course of the tunnel, covering the strip which intervenes between the blind lodes, and between the full width of lode claims located thereon, and having made this location after the location of the tunnel, secures a patent in a proceeding to which the tunnel locator is not a party, and to which he was not permitted to make himself a party. Thereupon portions of the tunnel covering these areas are exsected, and all right to pass through them is taken away; the unity of the tunnel is destroyed; and although the law has authorized operations through it to ground beyond, to the extent of hundreds of feet, this right is lost by a judgment to which its owner was neither party nor privy, and every advantage and inducement granted and held out by the government for the purpose of securing the de-

velopment naturally resulting from the expenditures made in the running of tunnels, is, without process of law or an opportunity to be heard, forfeited. The statute concerning tunnel rights authorizes the running of a tunnel three thousand feet in length. This grant is wholly ineffectual, if its enjoyment must depend upon the discovery of blind lodes in its progress, and if that portion in which blind lodes are actually discovered is made useless by the failure to have discovered others in the preceding portions of the tunnel. The law makes no provision for the surrender, forfeiture, or annulment of segregated portions of the bore of the tunnel, at any time when the tunnel site location, which is always treated as an entirety, has been maintained in compliance with the law. Such doctrine does not merely take part of the tunnel, but in effect takes all of it. The statutes which authorize the location of lode mining claims give to the locator thereof all veins throughout their entire depth the tops or apexes of which lie within the surface boundaries of the claim and the surface of the claim.

United States Revised Statutes, Sec. 2322.

The tunnel does not interfere with surface rights, or the exercise of all the title given with reference thereto, nor does it interfere with the ownership and operation upon the known or outcropping lodes located by others. The two titles are harmonious, they exist without conflict and contemporaneously, and such is the manifest meaning of the statute. There is no argument which can be made for destroying the title to the portion of the tunnel lying between a blind lode and the portal of the tunnel, which is not equally applicable and forcible in destroying the right to the tunnel between discovered

lodes, or between the lodes discovered, and the ultimate breast or farthest end of the tunnel. There is nothing singular or abnormal in a patent being received subject to rights of way in others. This condition exists concededly with reference to veins apexing in another location, and with reference to rights of way for ditches, flumes, roads, etc., all of which interfere more directly with the exercise of the title and estate created by the location and granted by the patent, than the existence of and operation through a tunnel.

U. S. Rev. Stats., Secs. 2340, 2333, 2477, 2322.

The law concerning placer patents excludes therefrom known lodes, although not in terms excepted, unless patent is specifically applied for thereon.

U. S. Rev. Stat., Sec. 2333.

The patent for a placer claim need not expressly exclude a located claim in conflict therewith, nor the lode claim adverse the placer location, yet, since the claim had been segregated from the public domain, it is not included in the placer patent, but as a matter of law in effect, though not in form or words, is excepted therefrom.

Noyes v. Mantle, 127 U. S., 348.

Sullivan v. Iron M. Co., 109 U. S., 550, 554.

Petitioner in its brief has devoted considerable space and rhetoric to what is therein termed an analysis of the opinion of the Circuit Court of Appeals. In this analysis, while interlarding the same with extracts from the opinion, petitioner has plentifully interspersed through it assertions as to the inaccuracy of the Court's views of the

pleadings, alleged misquotations therefrom, disregarding of principles of law and decisions of this Court, a generally wild and lawless course by that Court in reaching its conclusions, the dire results which the brief prophesies will flow therefrom, should not that decision be speedily reversed. The sure, swift and overwhelming refutation of these claims and assertions—we might almost designate them as aspersions—will be found in an investigation of the record and a careful reading of the entire opinion. It will be found that many of the dark, inscrutable results and positions announced to have been disclosed in this opinion, as depicted in the analysis, grow light and reasonable, under the illumination of what the Court in fact said and the real positions it took and the reasons actually announced therefor. A defeated litigant is seldom a fair critic or safe interpreter of an adverse decision, or an impartial judge of its logic, learning and justice. We shall, therefore, leave the decision to make its own reasonable defense against the analysis. The opinion, however, must in fairness be taken in its unity, not in broken and disconnected parts. We need not here repeat the citation of cases referred to in the opinion as the grounds of views of the law therein expressed. A persistent error and misapprehension which runs through petitioner's brief is the statement that the lode claims were first located, that is, were located before the tunnel site was located. This, as we have stated, is not the fact, and what we have desired, and the Circuit Court of Appeals held we had a right to do, was to disprove this contention. There is an allegation to this effect in the complaint, but it is denied in the answer, and the answer affirmatively alleges the contrary. Petitioner's brief desires that its assertion shall be taken as a fact, that it

shall not be permitted to be denied or disproved, and that it shall not be required to establish its denied allegation by sufficient and competent evidence. Making the assertion, it seeks to exclude opposing allegations and proof. It desires that without proof, it shall be sustained against proof. The Circuit Court of Appeals declined to endorse this proposition, this unwarranted assumption; but in so declining gave no warrant for the assertion of petitioner in announcing what it claims the Court held. The ineradicable vice of petitioner's contention is, that it is based upon an assumed but non-existing fact, and that it urges as applicable principles which could only be pertinent after the fact had been legitimately ascertained, but which could not be legitimately invoked in ascertaining whether the fact existed.

ESTOPPEL.

Paragraph 13, P. R., p. 40, alleges the amount of money which has been spent in the prosecution of said work, and which sum of money was spent with the knowledge and acquiescence of petitioner, and is one of the connecting acts and steps relied upon by the respondent in this defense of estoppel *in pais*.

In paragraph 15, P. R., p. 40, it is shown that this tunnel passed entirely through the property of the petitioner at a distance of 1,175 feet from the portal or mouth thereof, and, as it alleged later in the answer, certain property has been located and is owned, and was being worked by respondent, beyond this 1,175 feet, and the last part and portion of paragraph 15 contained on page 7 of the answer, P. R., p 41, again sets up the defense of

estoppel *in pais* against petitioner for its right of way through the property of petitioner for the purpose of working and mining in its property lying beyond.

Paragraphs 16, 17, 18, 19 and 20, P. R., pp. 41-47, each alleges the discovery and ownership of certain lode claims discovered in the tunnel, lying beyond the property of this discovered in the tunnel, lying beyond the property of petitioner, and for each piece of property alleges grounds for a right of way for the mining and operation of same against petitioner.

Regardless of the question of patents or relative rights accorded to lode claims and tunnel claims, the doctrine of estoppel is applicable here, as it is in every case involving rights to property. No matter how absolute the title of petitioner herein to its property and to the Little Mary and Ocean Wave claims, those rights might, by voluntary action or acquiescence, be abridged, modified, or granted to respondent, and if it has, with full knowledge of the work being done and the money expended, allowed respondent to prosecute its work, to use its property both for the purpose of discovery and later of operating the property which was discovered, and of mining it through this tunnel, and if such extensive workings, discoveries and mining were undertaken in reliance by respondent on the acquiescence and permission granted to it by the petitioner, then petitioner is estopped to set up its rights; the defense is a good one.

The general rule is that one who, without objection, suffers another who claims title to enter upon land and make improvements thereon, is estopped from asserting his own title.

Goddefroy vs. Caldwell, 2 Cal., 489; 56 Am. Dec., 360;

McGarrity vs. Byington, 12 Cal., 426;
Eldridge vs. Walker, 80 Ill., 270;
Bullis vs. Noble, 36 Iowa, 618;
Brown vs. Trustees, 37 Md., 108;
Nixon vs. Carco, 28 Miss., 414;
Collins vs. Rogers, 63 Mo., 515;
Evans vs. Snyder, 64 Mo., 516;
Town vs. Needham 3, Paige, 545;
Robinson vs. Justice, 21 Am. Dec., 407;
Chapman vs. Chapman, 59 Pa. St., 214;
Patton vs. McClure, 8 Tenn., 333.

Certain parties conveyed to the United States the privilege to divert so much water from a certain spring as would pass through a pipe of equal diameter with one that conveyed the water to the grantor's premises, the intention being to convey one-half of the water. The distance which the United States wished to carry the water was much greater than to the grantor's premises, which made it necessary to lay larger pipes than those of the other party to obtain one-half the water. The grantors were present when the pipes were laid, and made no objection. Held, that the grantee whose deed conveyed to him one-half of the water, could not claim a different construction of the deed to the government, so as to interfere with the arrangement for conducting the water from such original grantor's premises.

Irwin vs. U. S., 57 U. S. (16 How.), 513, 14 L. Ed., 1038.

Plaintiff knew that defendant claimed the property under a sale made in an equity suit to which he was an

original party. Instead of taking steps to have such sale set aside as a nullity, he, with full knowledge of all the facts, appeared before an auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by such sale, but without raising any question as to its validity. Knowing that defendants' claim rested on such sale, he remained silent while they expended large sums in their improvement, and in effect disclaimed title in himself. Held, that the doctrine of equitable estoppel would apply in favor of defendants.

Kirk vs. Hamilton, 102 U. S., 68, 26 L. Ed., 79.

A mortgagee of a decedent mortgagor was, with the consent of the widow and sole heir, appointed administrator. He foreclosed the mortgage, and bought the property for its full value, and assigned his certificate of sale to defendants, who took in good faith under what they supposed to be a valid judicial sale. The widow and heir assigned her right to redeem to plaintiff, who failed to redeem, and defendants thereafter received a sheriff's deed, and took possession. Held, where defendants had been in possession over three years, and paid the taxes and made valuable improvements with the full knowledge and consent of the widow and plaintiff, that they were estopped from asserting title as against defendants, even though the decree of foreclosure and the sale thereunder were nullities.

Bryan vs. Pinney, 31 Pac., 548.

Where plaintiffs permitted defendant to possess the property as her own for seven years, and make such improvements that the annual rental value was raised from

$800 to $2,500 without notice of plaintiffs' equitable claim, they are then estopped from asserting it.

Gibson vs. Herriot, 55 Ark., 85, 17 S. W., 589, 29 Am. St. Rep., 17.

Where the owner of an unrecorded deed of land permits another to perform work thereon at the instance of one holding himself out as owner, without asserting his title, he will be estopped to deny the title of such other to defeat a mechanic's lien.

Meller vs. Valentine, 3 Colo., 255.

The grantee of a trustee who has purchased property at a foreclosure sale of a trust deed to secure bonds, will be estopped from claiming that an execution sale of the property as that of the original owner, under a judgment in attachment which became a lien on the property prior to the execution of the trust deed, is void for want of proper service in the attachment suit, where the trustee and some of the bondholders knew of such irregularity in the service for many years, without seeking to avoid the sale, while the purchaser on execution was in possession, making improvements, and defending suits involving the title.

Brown vs. Wilson, 21 Colo., 309, 40 Pac., 688.

Where the owner of a grist mill claimed only an equitable right to restrict one owning another lot on the same stream from having another mill on that lot, and permitted, without objection, an expenditure of $2,000 in repairs on the latter mill, it was held that, if he would otherwise have had an equitable right to the easement, yet

he had lost it by standing by and seeing the expenditures made on the property without making objection.

Mitchell vs. Leavitt, 30 Conn., 587.

The fact that a boundary line was in controversy at the time plaintiff, relying upon its location at a certain point, made valuable improvements on his land with the knowledge of defendant and on the faith that defendant would not insist on the survey as later claimed by him, will not prevent an estoppel arising against such defendant from his acts, unless the nature of the controversy was such that it repelled the inference which the party claiming estoppel asserts that he acted on.

Noble vs. Chrisman, 88 Ill., 186.

Where a person without objection suffered one claiming title to land to enter thereon and make improvements, he can not plead that he had forgotten that his deed or title covered the land in controversy.

Bullis vs. Noble, 36 Iowa, 618.

Where a railroad company for many years fails to object to the purchase of land from a county as swamp land, and permits the purchaser to make improvements thereon, it is estopped, though the land is subsequently confirmed to it by the Secretary of the Interior, to deny the title of the purchaser.

Bourne vs. Ragan, 96 Iowa, 566, 65 N. W., 826.

Where plaintiff, after filing a homestead entry on public land, agreed to convey the land, in violation of the homestead act, to defendant, who took possession and made valuable improvements, and, at plaintiff's request,

purchased an outstanding claim of title, plaintiff is estopped from claiming the land under a patent subsequently procured.

McKinnis vs. Scottish-American Mortg. Co., 55 Kan., 259; 39 Pac., 1018.

The plaintiff held land under an equitable title, which by twenty years' adverse possession had ripened into an absolute title. The holder of the record title conveyed a perpetual easement in the land, with the knowledge of the plaintiff, who received the consideration and stood by without objection while large sums were expended in improving the easement. Held, that the plaintiff was estopped from asserting any title as against the easement.

Martin vs. Maine Cent. R. Co., 83 Me., 100, 21 Atl., 740.

The T. Co., owning the E. ½ of the S. E. ¼ of a section, laid out and surveyed thereon, and platted in lots and blocks, a town; the recorded plat and the survey on the ground showing the dividing line between the N. E. ¼ and the S. E. ¼ of the quarter section to be south of block 63. After all the town, except blocks 62 and 63, had been vacated, the L. Co. got title to all the property, and sold to the plaintiff a part thereof, described in the deed as "all that part of the S. E. ¼ of the S. E. ¼," etc., which, on its face, according to a correct survey, would include a strip off the south end of the lots in block 63. At the time of the sale neither the plaintiff nor his grantor supposed any part of the block was included in the conveyance. Thereafter the L. Co. sold lots in the block to defendant, who improved them. Held, that plaintiff, as well as his grantees, was estopped to claim any part of the lots sold to defendant, especially

as, before the purchase by defendant, plaintiff had had survey made, and knew where the true dividing line was, but made no claim on account thereof till the improvements had been made.

Craddock vs. Short, 134 Mo., 449, 35 S. W., 1141.

For a company having an exclusive right of bridge and ferry across a certain river to permit a rival bridge to be erected across it without interposing objection, will estop them from objecting to use of such bridge.

Fremont Ferry & B. Co. vs. Dodge County Com'rs, 6. Neb., 18.

Where a man lies by and permits another to erect works at great expense, and to use them for several years without objection, he is estopped to question the latter's right to use such works in the same manner as they have been before used.

Southard vs. Morris Canal & B. Co., 1 N. J. Eq. (Saxt.), 518.

Where a person entitled to a right in the nature of an easement encourages another, though passively, to acquire title and expend money on the assumption that that right will not be asserted, he will not be permitted in a Court of Equity to assert his right to the prejudice or injury of those who have been encouraged by acquiescence to expend money on the faith that his rights will not be exercised to defeat the just expectations upon which such expenditures have been made. Where such acquiescence has continued for a period of twenty years, or even less, his right is extinguished by estoppel.

Morris & E. R. Co. vs. Prudden, 20 N. J. Eq. (5 C. E. Green), 530.

Where a party purchases land at its full, fair value, and, supposing it to be free from incumbrance, erects buildings of considerable value, and judgment creditors of the former owner of the land, having knowledge that these buildings are being erected, and having reason to believe that it was done under a mistake, by their silence and acquiescence fraudulently encourage him to go on and erect his buildings, they may be restrained by injunction from selling upon execution the buildings erected under their fraudulent acquiescence.

Dellett vs. Kemble, 23 N. J. Eq. (8 C. E. Green), 58.

Where one purchases land from a person whom he knows has granted valuable riparian rights pertaining to it, and valuable improvements have been made on the faith of such grant, he will not be allowed to question the authority to make such improvements.

McCann vs. Oregon Ry. & Nav. Co., 13 Ore., 455; 11 Pac., 236.

The holder of an adverse title to land, and those claiming under him, are estopped to set up such title as against D., where such holder acted for D. in soliciting another to convey to D., knew that D. had purchased and paid for the land believing that the grantor had title thereto, saw D. make extensive improvements on the land, and kept silent as to his own adverse claim.

Wahl vs. Pittsburgh & W. Ry. Co., 158 Pa. St., 257; 27 Atl., 965; 33 Wkly. Notes Cas., 307.

Complainant's grantors, in erecting an addition to their pottery plant, located it by mistake on contiguous

land belonging to defendant. Defendant knew of the erection of the addition, and that it was on its lands. The conveyance to complainant of the pottery plant did not include in its description the land on which the addition was located. Held, that defendant is estopped from disturbing the buildings or removing soil necessary for their support.

Fell vs. Pennsylvania R. Co. (Ch.), 20 Atl., 63.

The defense of estoppel is available at law as well as in equity.

Dickerson v. Calgrove, 100 U. S., 578.

DeGuire v. Lead Co., 38 Fed. 65.

Kirk v. Hamilton, 102 U. S., 68.

Ward v. Cochran, 71 Fed., 131, and cases cited.

The respondent was, under the ruling of the trial Court, certainly deprived of at least two complete and meritorious defenses, namely, that of estoppel and the right to prove the date of location and discovery, and in either event we ask this Honorable Court that the decision of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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ADDITIONAL BRIEF FOR RESPONDENT.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 18.

Office Supreme Court U. S.
FILED
APR 26 1904
JAMES H. McKENNEY,
Clerk

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

GERALD HUGHES,
C. J. HUGHES, Jr.,
SCOTT ASHTON,
Attorneys for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

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THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

CERTIORARI TO THE UNITED STATES CIRCUIT COUET OF APPEALS FOR THE EIGHTH CIRCUIT.

ADDITIONAL BRIEF FOR RESPONDENT.

The additional brief filed on behalf of the petitioner contains repetitions of some things included in its original brief, but many others which can not be called matters of reply to respondent's brief, and which were either for the first time presented in the oral discussion or in the brief itself.

We disclaim, while thinking our original brief makes the disclaimer unnecessary, any purpose to impute improper feeling or animus on the part of counsel for petitioner toward the Circuit Court of Appeals or its distinguished members, or any intention to present to this court any view or criticism of the decision of the Circuit Court of Appeals in which they do not have sincere belief. But it is manifest that they do not base their criticism of the Circuit Court of Appeals upon the facts which that court made the basis of its decision, and that they do put that court in an attitude of hostility to a decision, the full force and effect of which that court avowedly recognized, and without any repugnancy to which

they rendered their own decision. With these remarks upon this subject, we must pass to what we esteem the weightier matters of the law.

For the first time in the history of this case, at the oral argument herein, counsel for petitioner asserted that the motion to strike, the sustaining of which was complained of by respondent and held to be error by the Circuit Court of Appeals, could be sustained, and was based upon the alleged existence of several conflicting defenses improperly joined as to form of the union. An examination of the motion itself (printed Record, page 72) discloses that no such ground was therein contained. No such ground existed. When the case reached the Circuit Court of Appeals the action of the trial court was not sought to be sustained upon this ground, nor was it alluded to in any manner whatever, as a careful examination of the briefs in that court discloses. When the petition for certiorari was filed, and the brief in support of it in this court, no hint was given of this contention, nor was there in the assignment of errors, and when the brief of petitioner upon the merits was prepared it, too, was equally silent.

Were it true, as it is not, that several inconsistent defenses had been improperly jumbled together in the answer, to take advantage thereof, it was necessary to file an appropriate pleading in the trial court specifically and expressly raising that objection, so that the court might pass upon it, and counsel, in the event the objection was sustained, might reform the pleading by separating the defenses. All a purely formal matter, at no point touching the merits. A failure to take this course, as is universally held in such matters, constituted a waiver thereof. Certainly such a point could not be raised for the first time in this court, in view of the history of the case and the nature of the objection, the briefs, assignments of errors and other evidences of the contention in fact made.

The answer and offers of evidence show that when the petitioner instituted its original proceeding in the District Court of El Paso county, Colorado, the respondent's tunnel had passed through both the Ocean Wave and Little Mary

laims, and had reached a total length of twenty-two hun-red feet. (Printed Record, page 25.) The original plead-ng, or petition for survey, filed in the District Court of El Paso county, proceeded upon the theory and allegations that he respondent was mining ore within the surface bounda-ies of the Ocean Wave and Little Mary lode mining laims, upon veins the property of petitioner. (Printed Record, page 2.) Upon these assertions an order for survey vas obtained. (Printed Record, page 10.) The complaint iled in the District Court, a distinct pleading from the peti-ion for survey, likewise alleged a trespass, consisting of the ining of ores from veins lying within the surface bound-ries of the Ocean Wave and Little Mary lode mining claims, he property of the petitioner. (Printed Record, page 6.) Only when reformed pleadings were filed in the United States Circuit Court, was this theory and claim abandoned, and the claim first made that by operating the tunnel hrough the Little Mary and Ocean Wave claims the re-spondent was invading the rights of the petitioner. Until hen the pleadings were in harmony with the idea that a perfect right had been acquired by the respondent and was being asserted in operating the tunnel through the two lode laims, and that the offense which was charged upon the respondent was not of thus operating its tunnel, nor of hav-ing run it through the claims, but of having made an unlaw-ful invasion of lodes and veins containing mineral within hese claims, the property of the petitioner.

The difference between these positions, these claims, hese causes of action, is at once apparent. If it were true hat the respondent had utilized its tunnel for the purpose of obtaining access to lodes and veins which were not its property, but which were owned by the petitioner, and was mining and converting it to its own use ore therefrom, these acts would in no wise be justified by any right which had been acquired by the respondent through the location of its tunnel site. On the other hand, if the tunnel location had been made before any valid, in fact, any location of any nature, of the lode claims, there had thereby been acquired a right to run the tunnel, superior to any location which

could be made by the lode claimants, and this right would be a perfect legal justification for extending the tunnel through these claims, and of operating through the tunnell thus extended.

The answer alleges that the tunnel had been run 2,200 feet from its portal one year before suit was brought, which carried the completion of this portion of the tunnell to June, 1896. It was further alleged that the plaintiff therein, the petitioner here, had permitted this to be done without objection, etc. (Printed Record, page 25.) It is now claimed, in the brief of counsel for respondent just filed, that it is alleged in the answer that no objection was made until after the Uinta tunnel veins, numbers 23, 24, 25 and 26 were discovered, and that then, and because of these discoveries, objection was made, and that this can not in fact be true, since the suit was brought in June, 1897, and the veins were discovered in December, 1897, and January, 1898, as alleged in the answer. It is true that in alleging the formal legal discovery of these veins, the dates are given as stated by counsel for petitioner; but it is also alleged that the tunnel had been run a distance which necessarily and actually cut these veins a year before the suit was instituted.

It is to be borne in mind, in this connection, that when the tunnel thus penetrated the mountain and cut the veins, no objection whatever had been or was made to the running of the tunnel; that about a year later the objection was made. It was thereafter, as the record indicates, that the respondent determined to make a formal location of the veins thus cut, by means of surface staking, such as is referred to in Campbell vs. Ellett, 167 U. S., 118, and in Enterprise Co. vs. Rico-Aspen Co., 167 U. S., 116.

There are two so designated discoveries known and recognized in mining law and in common parlance with reference thereto, and also in pleadings and discussion of the subject generally, one the actual finding, the physical ascertainment of the existence, which is a discovery, the other the legal discovery of a date selected as the beginning of the location of the claim which is the discovery of the claim. Mr. Morri-

son has indicated this distinction and double use of the word, in work on Mining Rights, 11 Ed., page 31.

> "The discoverer in law is not necessarily the original finder, but any one who, knowing of the existence of the mineral, takes some step toward an appropriation of the land which contains it. Nevada Co. vs. Home Co., 98 Fed., 673; Jupiter Co. vs. Bodie Co., 4 M. R., 411."

In the answer the allegation is that the tunnel had penetrated these veins, had reached the distance referred to, before any objection was made and before the suit was instituted (Printed Record, page 25), and the allegations are not of the character stated in the additional brief filed herein by counsel for petitioner. Were his contention true it could not answer the claim of estoppel, nor render inapplicable the authorities cited in our original brief. It would be in the line of removing an apparent and appreciable motive for the change of attitude, but would not negative the allegation or change or minimize the wrong.

There was introduced in evidence at the trial below no record or purported or alleged record of proceedings in the land office, and there is no allegation in the pleadings and no proof in the case, to the effect that the land office proceeded upon the theory that the discovery had been made upon the second day of January, 1892, or at any time prior to the entry itself. Counsel assert in their brief that in the issuance of the patent government officials proceeded upon the theory that a discovery had been made on the second day of January, 1892. This claim, assertion, or argument, whichever it may be, is utterly without support in the pleadings, in the proof, in fact, or in the law.

While it may be claimed to be assumed, for the purposes of making an entry and issuing a patent upon a lode mining claim, that the law requiring a discovery within its boundaries has been complied with, and that a discovery has, when the entry is allowed, in fact been made, it is unnecessary that this discovery should be made as of a date asserted

in a location certificate, or at any particular time earlier than the date of the ascertainment of this fact in the land office, which may be as late as the entry itself. This is an ingenious attempt to fortify the falling and disproved claim that a location certificate, the ex parte act of the claimant himself, imports verity and establishes beyond controversy the existence of a discovery at any time the claimant may choose to have the certificate dated by the claim that the land office or the interior department investigating, or presumptively investigating this question, had found as a basis for the issuance of the patent, that the discovery had then been made. There is no such presumption. The department makes no such investigation. The determination and the making of it is wholly unnecessary to the making of the entry and the issuance of the patent. We have in our original brief discussed this matter, at page 34, and call attention to additional authorities as follows:

Morrison's Mining Rights (10th Ed.), page 29, and cases cited.

Lindley on Mines, Vol. 1, page 454, and note.

Smith vs. Newell, 86 Fed., 56.

It was expressly, in answer to a query from a member of this court, conceded in the oral argument, and in the additional brief filed, that a tunnel site could not be patented, although it is a valid appropriation, under permission of law, of rights upon the public domain, entitled to the protection of the law. This admission, we maintain, fully sustains our position, that since no formal grant, as by patent, is issued, and the tunnel site location is a valid and vested property right, perfect, complete and unassailable when and so long as the law is complied with, that whoever assails it, whether by virtue of a patent issued in a proceeding to which it is not a party, or by virtue of alleged prior location of a claim, when these controversies reach the court, each party thereto is free, by a proper pleading and competent evidence, to establish their respective priorities, and to attack mutually the pretences or claims, allegations and contentions of the oppo-

nent with reference to the dates to which it undertakes to attach the origin of its rights. The whole system of adverse proceedings in the land office, and in suits in court dependent thereon, is the creature of statute. Without the statute no such right existed, either to obtain title or to have a determination of conflictig claims. The statute provides only for the determination in this method of conflicting surface claims between those who assert title to the same area, and each of whom has a right, when the other applies for patent, not only to contest that application, but to make its own application therefor. All the authorities cited by petitioner and respondent, with reference to the subject of adverses, proceed upon the assumption, or else precisely decide, that adverse proceedings are intended to and only apply to surface conflicts. But there is in this connection a provision in the statute with reference thereto which is conclusive upon this subject, as is also the failure of the statute to provide for an adverse on behalf of a tunnel site location, or an application on its behalf for patent. In Revised Statutes of the United States, after providing for the filing of an adverse claim and defining the nature thereof, section 2326 contains the following:

> "* * * It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general, that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, to-

> gether with the proper fees, whereupon the whole proceeding and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. * * *."

In effect, the provision concerning adverses is intended to cover only those who have adverse claims to the surface of the same territory, and who are entitled to a patent therefor in the event their title is in the proceeding superior to that of the contestant, and are expressly by this section authorized to proceed to a patent, paying so much per acre for the land, without taking further proceedings than by presenting a copy of the judgment roll in the land office. This can not be done with reference to a tunnel site location. The statute is utterly inapplicable thereto; and in this provision we find a confirmation of our theory, manifest from a reading of all the statutes upon the subject, that not only is the tunnel site without opportunity to obtain a patent for the rights to which it is entitled as a tunnel site, but that it is not required to make an adverse, and that the making of adverses is left to those only who have the same character of claim to the surface of the same property. The provision of section 2325 U. S. Rev. Stat. plainly asserts the same doctrine. It says: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner. * * *" See, also, section 2326.

With reference to the title to tunnel site locations a condition exists which is not peculiar. The government has granted many valuable rights to those who shall comply with its statutes, without making provision for the issuance of a patent, the making of a purchase or the taking of proceedings in the interior department or in the courts, for the purpose of ascertaining, with reference to conflicts concerning the same, who has the better right. This has never raised any doubt as to the completeness of the grant, as to the absolute withdrawal of the rights thus obtained and appropriated from

the public domain, or to their protection in the courts by appropriate proceedings against all who seek to invade or challenge them. Among the prominent instances of this kind, in addition to those to which we have called attention in our original brief (page 39), we cite the statute giving a right of way to railroads over public lands.

Act of March 3, 1875.

18 Stat. at L., page 482.

Here a valuable right of way is given. A map is filed, which is approved in the interior department. It contains a provision for forfeiture, in the event that any given section of the railway shall not be completed within five years. This court has again and again sustained the validity of these rights, although the holder thereof has only the approval of his plat to establish the same, and has no right, under any statute, to have a determination of conflicting rights thereto, and gets no deed or patent therefor. Not only this, but where rights have been granted over the same land to others, and a conflict has arisen in the courts between the contestants, the right has been fully sustained.

M., K. & T. Ry. Co. vs. K. P. Ry. Co., 97 U. S., 491.

U. S. vs. Southern Pac. Ry. Co., 146 U. S., 593.

Noble vs. Union River Logging and Ry. Co., 147 U. S., 165.

U. S. vs. Southern Pacific Ry. Co., 62 Fed., 535.

Southern Pac. Ry. Co. vs. U. S., 168 U. S., 45.

Southern Pac. Ry. Co. vs. Groeck et al., 31 C. C. A., 334.

Northern Pac. Ry. Co. vs. Musser Saunitry Land, Logging and M. Co., 68 Fed., 993.

Galliher vs. Cadwell, 145 U. S., 368.

St. Paul, etc., vs. Winona, etc., R. R. Co., 112 U. S., 720.

Like provisions are made for reservoir sites.

Sup. to Rev. Stats., volume 1, pages 626-792 and 945.

Counsel have sought to strengthen their contentions in this case, and their position with reference to the applicability of the Ajax-Calhoun decision hereto, by a reference to the argument made by losing counsel in that case. We have examined the briefs of counsel in that case, and find that counsel who were successful, and who maintained their lode claims against the proffer of the plaintiff in error therein, only contended that the patent was conclusive from the date of the entry shown therein. It was not therein contended, the question was not discussed by counsel on either side, nor the matter presented to this court for its determination, as to the date back of the entry to which and the circumstances under which the patent would relate. It was not contended on behalf of the patentee that his patent would run back to a date of discovery recited in a location certificate, and that this date would be taken to have been conclusively established as against the tunnel site locator, or that relation in that case went, or that it was necessary to have it relate to a date earlier than the entry. The thought of establishing, by a decision of this court, the novel doctrine that the mere recital in a location certificate should be taken as conclusively establishing the date of discovery, and that, too, against one who was given no opportunity to contest the correctness thereof, is repugnant to all the decisions that bear upon this subject, to the spirit of the law and the provisions with reference to the force of a location certificate and the doctrine of relation as applied to patents. It is a common practice, as demonstrated in the various reports of litigation, whether in adverse or otherwise, that discoveries are alleged to have been made of dates much earlier than they were in fact made; alleged to have been made in places where they were never made, and at times when they did not exist. These matters are always left open to evidence, and it many times occurs that a discovery, which, according to the so-called

record in the recorder's office, by the recitals of the location certificate, is many years anterior to the recitals in another certificate of another claim, is in fact junior thereto when it exists at all. In every instance in which the question has arisen, either in adverse suits or in controversies between lode mining claims having apexes to bodies of ore which are found in a vein after the union thereof, or between owners of ditches and other rights, the courts have held that the recital in the location certificate is without effect, and the obligation is upon him who asserts his priority to establish it by competent evidence, and the right exists in his opponent to meet and refute the claim and the evidence introduced for that purpose. The Ajax-Calhoun case is not, and does not purport to be, an exception to this rule. In that case an entry had been made of the lode claims whereby the right to the patent was complete; the government lost all beneficial interest in the title, and that of the entryman was absolute. From that time forward the territory was not public domain; it was not only not unappropriated public domain, but to no extent public domain at all. It had become private property. The permission, therefore, granted by the government to tunnel locators to go upon the unappropriated public domain, did not cover this territory, or give any right whatever to make location of any kind hereon. This had been conclusively determined by all who were interested, or claimed to be interested therein, or had prior to the entry initiated any right which might be in conflict therewith. The rights of the respective parties were exactly as though this territory had always been private land, had never at any time been subject to disposition by the government, or to its permission or invitation to its citizens to enter upon, explore, locate and acquire interests therein. Not only this, but those who had acquired no rights prior to the entry were without standing to assert that by trick or fraudulent device, or by failure to comply with the law, the patent itself had been obtained. They were wholly without privity to the proceedings and the title, and wholly without right to assail in any way, directly or collaterally, the issuance of the patent and the absolute and indefeasible character of the ownership. The government, having by this entry parted with and received pay

for all interests it had held in the land, was powerless thereafter to authorize another to acquire interests therein or to institute proceedings for the purpose of invalidating the title which it had granted. In the case at bar, as poined out in our original brief, as demonstrated by the Circuit Court of Appeals, it was claimed on behalf of the petitioner, and this based wholly upon evidence *dehors* the patent, and not in any sense or to any extent upon land office records, or proceedings, that discoveries had in fact been made on January 2, 1892, although the location certificates were not filed until February 1, 1892. To support the claim of the discovery and of the inception or inauguration of the title and right as of January 2, 1892, the petitioner introduced in evidence location certificates, reciting in the notation below the signature of the parties that the discovery had been made upon January 2, 1892. There is no statute giving any force or effect, probative or determinative, conclusive or prima facie, to this recital in the certificate. There is no means of compelling the same to be truthfully made. There is nothing to protect the date against the cupidity of the locator, and a desire upon his part, by this ex parte and self-serving act upon the record, at least to create a priority over some one who has rights which are in fact prior and superior to his own. A broad invitation to the commission of fraud, a wide door, a splendid opportunity for the perpetration thereof, would be at once opened and given, by the establishment of the doctrine that any weight or force or validity was given thereto, or that it was aught else than a declaration in one's own behalf. Take the present case by way of illustration. The respondent's grantor had posted, as required by the regulations of the land office made in pursuance of United States Revised Statutes, section 2478, its notice at the portal of its tunnel, thereby inaugurating its right, on the 13th day of January, 1892. On the first of February following the petitioner, or its grantors, filed a location certificate in which a date is given to the alleged discovery, of January 2d. An issue is raised as to whether in fact the discovery was thus made, for if not, then no rights existed whatever to the territory occupied by the tunnel, in behalf of the lode claim-

ants against the tunnelsite locators. The tunnelsite locators claimed that no location had been made, no discovery had been made, at the time their tunnelsite was located on January 13, 1892, and that the territory covered thereby was unappropriated open public domain, upon which they had a right to go, and upon which, having gone, instantly a vested right was created, which could be taken from them only through due process of law. They claimed that on that day the tunnelsite locator secured, under the tunnelsite statutes and regulations, vested rights to the full extent provided by law, and ever afterwards fully maintained them. At this time, and certainly on January 13, 1892, no discovery having in fact been made upon the Ocean Wave and Little Mary claims, the government had not parted, by any character of act or adjudication, with all or any of its title in the premises, and had not put the property beyond the right of its citizens to avail themselves of the invitation of the mining statutes, including the tunnelsite statute, to enter upon and appropriate the same. After the location of the tunnelsite, the location certificates of the Ocean Wave and Little Mary were filed, with what we claim to be their false assertions as to the date of discovery. At any rate it must be said that this date is disputed; and if it be in fact untrue, as the respondent pleaded and offered to prove, and as must be taken to be the fact in this discussion, in determining the effect of this claim, then the petitioner had no rights of any kind in the ground in dispute, when the respondent secured its rights, and could never thereafter, as against the respondent's title, have any, because the latter complied with the law and maintained the priority and superiority of its location. There has never been an adjudication involving this question between these parties. The rights of the tunnelsite locator, the respondent, have never been passed upon, and upon the assertion of its pleadings remain paramount. Upon the allegations of the pleadings, and without any adjudication to the contrary by any competent tribunal, the respondent stands in the attitude of having located and become entitled to the rights it asserts, and as it alleged and offered to prove, to have withdrawn them from the public domain, appropriated them, ac-

quired vested rights in them and made them private property, and while no patent, deed or other conveyance is by law provided for, and no conveyance was or could be received, this left the grant by the government, the right thereto of the respondent, as perfect, as fully vested, as if it had received a patent therefor. The property claimed by the respondent, and to the extent covered by its location, having been thus withdrawn from the public domain authorized to be appropriated, was therefore no longer subject to grant by the government nor to location or acquisition by the petitioner or its grantors. No acts of the government or of the petitioner could thereafter divest the respondent of its rights. The adjudication of the interior department could not destroy them, for to them the respondent was not a party, and of its rights there was no jurisdiction, nor was there of the person of the locator, and the government could not grant again that which it had already conveyed, and which had thereby ceased to be public domain. While the case was one in which there was a contest between a placer and a lode claim, the decision of this court in Noyes vs. Mantle, 127 U. S., in harmony with other decisions, has settled the general principle for which we contend, and which is in no sense limited to placer claims, but is necessarily universal in its application. The court say, speaking of the claims which had been located prior to the location of the placer:

> "There is no pretense in this case that the original locators did not comply with all the requirements of the law. * * * They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. * * * The ground itself was not afterwards open to sale. The location having become completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim. * * * As said in Belk vs. Meagher, 104 U. S., 279, 283: 'A mining claim perfected under the law is property in the highest

sense of that term, which may be bought, sold and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government. * * * *A patent of the government can not, any more than a deed of an individual, transfer what the grantor does not possess.*"

Here the grant was simply the legal result of a compliance with the statutes.

The reasoning herein is exactly applicable to the case we are considering. The tunnel site could never get a patent, and therefore had perfected its title to a degree which had not been done by the lode claimants, who might, at their option, have proceeded to obtain a patent upon their premises. The tunnel site was properly located in accordance with law, and by the grant of the statute fully vested, and was property to the extent and for the reasons stated in Belk vs. Meagher, cited *supra*, and being thus vested, thus granted, the government could not grant it again by a patent to the petitioner.

Among the well-known limitations upon the effect and force of patents, and their unassailable nature, is that they can not grant what has been by the government already granted, and so far as they attempt or purport so to do they are void, and their void nature may be shown in any proceeding at law or in equity in which the controversy arises.

St. Louis Smelting and Refining Company vs. Kemp, 104 U. S., 636-657, cited by complainants, and a quotation from which was much dwelt upon in the oral argument, thus states the law in the opinion delivered by Mr. Justice Field:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress

had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.

* * * * * * *

"On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, *or had been previously transferred to others.*"

In the case at bar, when the respondent acted upon the authorization and grant of the law, and in conformity therewith, the territory to which its rights attached was transferred to it by operation of law, under the statute; was withdrawn from conveyance to another, and the department and the government were wholly without jurisdiction to convey or patent it to another. The facts disclosing this condition may be shown, and so this court announced in the quotation, supra, and in other cases.

Can it be maintained that the government has discharged its duty to the tunnel site locator, who has invested his thousands and hundreds of thousands in reliance upon the good faith of the government and the validity of the grant made by the federal statute, while excluding him from

the formal acquisition of title, by a patent excluding him from a contest in the land office, permitting a patent to go as to him ex parte, and then making that patent conclusive against him, in behalf of one with whom he has never been permitted to wage his controversy, and who is, by a false recital in an ex parte document, permitted to destroy that which else was of great value, and fully justified the large outlays the government had induced him to make upon it? It would seem that the petitioner, having, without discovery, obtained a patent from the government in this case, as the alleged facts show, ought to be content to take that title, unassailed and unassailable to the extent the government had the right to give it, without seeking to give it an unreal and fraudulent date, for the purpose of taking away the use of the tunnel, which use in no way conflicts with the exercise of its dominion over anything which it was open to it, to acquire when it started its location, but which, when taken from the tunnel site locator, utterly destroys the value of the tunnel in all its parts, and makes waste of the large expenditures made upon it.

The real legal question presented is, when stripped of all extraneous matters and brought down to its logical and simplest features, did the petitioner, by getting a patent, take from a prior tunnelsite locator the rights which were in existence at the time when the petitioner in fact initiated his location? May special tribunals, of limited and peculiar jurisdiction, confined to definite subjects and to parties occupying definite relations thereto, determine rights of parties who are not and could not come before it, over titles with which they have no concern whatever? May a valid judgment be rendered by a tribunal never vested with jurisdiction of the subject-matter or of the parties? The more the question is studied and investigated, the more clearly it will become apparent that unless the petitioner can establish conclusively, as determinative of our rights, the ex parte judgment in the proceedings in which it applied for patent, it can in no way prevent an investigation of the truth, upon competent evidence under legitimate pleadings in this case. If the patent is absolutely conclusive, if it cut off and termi-

nated our rights forever, then why any necessity for the petitioner to allege and resort to the discovery recited in the location certificate? If, however, the necessity for this allegation and resort exists, since no law or decree has established the sanctity of the location certificate or made it invulnerable to attack, but one result can legitimately follow, and that is to permit a proper judicial examination into the controversy.

It is correctly announced, by opposing counsel, that a lode claim, when legally located, gives title to the claim as fully as does the patent, and that it is optional with the locator to retain his unpatented claim, or patent it. An advantage of the patent is that annual labor is no longer required, and conflicting surface claims are ascertained and determined by the adverse proceedings, which are incident to the patent application.

U. S. Revised Statutes, sections 2325, 2326.

It is also equally true that a tunnel site location, validly made and maintained in conformity with the law and regulations of the department concerning the same, gives, as to the bore of the tunnel and the right of way therefor, and potentially for all lodes subject to its location as they are cut and disclosed in the tunnel, all the rights incident and appurtenant to and a part of tunnelsite locations, as fully as does the lode claim location to the rights of that character of claim. The difference between the two characters of location is that the lode claimant, at his option, may obtain a patent for such rights as his location covers, while the tunnelsite locator can not do so. The rights of each are vested, protected by law, and constitute grants irrevocable in their character. If a controversy should arise between them, each is at liberty to establish, by proof, the initiation of his right, and, whichever is first in the legal, valid inception of his claim, will, to the extent of any conflict between them, each having maintained his claim by a compliance with other provisions of the law, prevail. One having the privilege, the option, to patent if he will, the other having no such right,

the first obtains his patent; he, if he came last upon the ground and initiated his right later than the other, there being no conflict upon that point, takes his location subject to, but not destroyed, not invalidated, by the prior tunnelsite location. The lode claimant, for illustration, concedes this condition of interests. He does not assert any hostile, or adverse, right to that maintained by the tunnelsite locator, and the government, only having power and jurisdiction to patent that with which it has not parted, which has not been acquired by the tunnelsite locator, issues the patent to the lode claimant. There has been, under these circumstances, no occasion for an adverse proceeding; there is no surface conflict; the statute by the terms of which only an adverse can be filed, has neither authorized, required or permitted the tunnelsite locator to institute such an adverse. The rule in such cases is that the law excepts, excludes, the prior grant from the patent, and this whether there be formal exception or not, in the language of the patent, and even when the grant in the patent has been expressly made of this excluded right.

Morrison's Mining Rights (11th Ed.), page 134.
Deffeback vs. Hawke, 115 U. S., 392.
Davis vs. Weibold, 139 U. S., 527.

The exclusion or inclusion, by the officials issuing the patent, of this particular right therein is of no legal effect. What other course by law could have been taken, had it been the purpose of the lode claimant to assert a title hostile to the tunnel location? Or, if the tunnel locator had desired to contest the question and have it adjudicated in the patent proceedings? Neither had the power to use that proceeding for that purpose. The law did not permit it. The patent can neither loose nor bind as to the prior rights of the tunnel site. The patent and the patent proceedings, therefore, left the parties free to proceed by the usual, full and adequate remedies at law and in equity, to litigate any differences which might exist between them. It is true, and will be conceded, that even if no patent had ever been applied for by the lode claimant, an action like this action

might be brought, and the whole question of their controversy therein fully determined. It does not follow that because the patent does not cover and conclude all controversies, that titles are left in open and defenseless condition, and subject at remote times to attack by a character of evidence precarious and unreliable. The litigation need not wait. Trespass, ejectment, injunction, are all ready at command, and are as fully competent to a just determination of the issues as the adverse proceeding, which ultimately falls back upon the courts on these very remedies. No one, then, need wait, even as long as is necessary to get a patent, to settle all matters affecting his title in conflict with a tunnel-site location. This is what, and all, we contend for. While the petitioner takes a position which is the very incarnation of injustice, and which violates every maxim of the law of every system of jurisprudence known to civilized nations. Strike, but hear first, was the ringing challenge to an attempt, under the Roman law, to dispose of rights without a hearing—without what we would term due process of law. This principle is older than our Constitution, than the Bill of Rights, than Magna Charta. It has its origin deep down in an inherent sense of justice, which lies at the bottom of the institutions of all nations having even the slightest regard for the frailest morality. Would it be justice to close the doors of a court in our face, to exclude us from participation in the proceedings, to tie our hands and close our lips, and then bind us by the decree, and under it strip us unheard of valuable property? And yet this is exactly what is attempted to be done, and all for what reason, for what purpose? Is any great public policy to be fostered by this sacrifice of right? None. All policies which should be encouraged can be done so as signally if a trial be had and justice then done. No plausibility of argument, no ingenious suggestion, no endless repetition of the tracing of a logical circle, no theory of assumption, can give the seeming of right to the suggested course for which petitioner contends. Our position protects all rights, hears all parties fairly, and justly passes upon the contentions of all who are interested.

It is claimed correctly by counsel for petitioner that while a discovery is necessary to a location, and this is pro-

vided by the express terms of the United States statutes, and has been so decided by this court and other courts repeatedly, that if in fact the other acts which should follow the discovery are done first, and thereafter the discovery is made, the location is valid. In other words, that discovery may be made after other acts of location, which usually follow it. There is some dispute upon this subject, but we are quite willing in this argument to concede this contention. The question then arises, when does the location begin? When are the rights of the locator inaugurated or initiated? Do they go back to the acts of location which were done before the discovery, or do they all take their date as of the discovery itself?

Mr. Morrison, in his Mining Rights, 11th edition, page 32, upon this subject says:

> "If a location be made before discovery, but is followed by a discovery in the discovery shaft, *before any adverse rights intervene*, such subsequent discovery cures the original defect, and the claim is valid. McGinnis vs. Egbert, 15 M. R., 329; Golden Terra Cotta Co. vs. Mahler, 4 M. R., 390; Jupiter Co. vs. Bodie Co., 4 M. R., 411; Zollars vs. Evans, 4 M. R., 407; North Noonday Co. vs. Orient Co., 9 M. R., 529; Erwin vs. Perego, 93 Fed., 608; Nevada Co. vs. Home Co., 98 Fed., 673; Brewster vs. Shoemaker, 63 Pac., 309; and the land department has followed these rulings. 28 L. D., 526.
>
> "But where a location and record were made with no discovery, a subsequent discovery will not relate back and cut out an intervening location. Beals vs. Cone, 62 Pac., 948."

The last case cited is also reported in 27th Colorado, 473. An extract therefrom is pertinent to this discussion. (Page 484):

> "The trial court excluded appellant's original certificate of location on the Tecumseh, which bore

date May 3, 1892; was recorded May 6, of the same year, and claimed a discovery on April 18, preceding. The evidence was undisputed that no discovery of mineral in place, such as the law contemplates, was made upon the Tecumseh until April 20, 1894, at which time appellant relocated the premises and filed a certificate of location. His counsel contend that the original location certificate should have been admitted, because a discovery having been made in the spring of 1894, it would relate back to the date of the original location. The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits. Section 2320, U. S. Rev. Stats. *Until such discovery no rights are acquired by location.* The other requisites which must be observed in order to perfect and keep alive a valid location, are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location, *but not so with discovery;* for it is upon that act that the very life of a mineral location depends, and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired rights therein. N. Noonday M. C. vs. Orient M. C., 6 Sawyer, 299."

This case, in which the distinguished counsel for the petitioner succeeded in the Supreme Court of Colorado, was brought upon writ of error to this court, but jurisdiction declined for reasons stated in the opinion therein.

Beals vs. Cone, 188 U. S., 184.

When such important rights are to attach to the date of discovery, the date relied upon should be a true one, and it must be established, when it is to take effect against another,

in a proceeding to which he is a party. This is but to state an axiom of the law.

Lindley on Mines, sections 335, 337.

Upon this subject Mr. Morrison, in his Mining Rights, 11th Edition, at page 30, says:

> "The fact of discovery must be proved by the party alleging it as the inception of his possessory right."

Sands vs. Cruikshank, 87 N. W.. 589.

> "Where a location is made without a discovery the land remains public domain until there be a discovery."

Tuolumne Co. vs. Maier, 66 Pac., 863.

One who seeks to base a right upon the existence of a fact, must prove that fact, and if that fact is necessary to the inception of his right, the right of course can not exist until the fact exist, and the proof of the right is therefore dependent upon the establishment by competent evidence of the act itself.

The public domain can not be vested in an individual by his doing some of the acts required by the government, while at the same time the essential and important act is omitted. Discovery is the basis of all lode claim rights. Until the discovery is made, the territory remains public domain. Being public domain, the pretended locator, he who has attempted to make a location, but has done so without complying with the fundamental requisites of the law, acquires no rights thereunder. He leaves the land exactly of the nature it was before he made his futile attempts. He can not call that a location which is lacking in the very essence of a location. He can not give to other acts the force and validity which by that statute is confined to a discovery. He is not permitted to substitute something else for the discovery.

Sands vs. Cruikshank, 87 N. W., 588, is a case in which the court took up the question, as was done in Cone vs. Beals,

of the necessity of a discovery as the basis of the right. The court say:

"Defendant's title to the ground in dispute rests upon an alleged location initiated January 1, 1886. The plaintiff's title depends upon an alleged lode location initiated September 9, 1891. As we read the record and understand the arguments of counsel, the only real controversy in this court relates to the sufficiency of the evidence to establish an actual discovery by defendants prior to the location of the plaintiff's claim. Assuming that defendants proved performance of the other acts necessary to the acquisition and continuance of their title, and that the plaintiff proved performance of all the acts required to make and maintain a valid location on his part, if the defendants made a discovery, within the meaning of the statute, the ground in controversy was not unappropriated lands of the government when the plaintiff's claim was initiated, and his location was void. 1 Lindley on Mines, 337. If, on the other hand, the defendants failed to prove an actual discovery prior to the intervening of the plaintiff's right, they can not complain of the judgment redered by the trial court. 'A location can rest only upon an actual discovery of the vein or lode. Such discovery must precede the location, or be in advance of the intervening rights.' Lindl., Mine, Sec. 335. Upon this branch of the case the trial judge found as follows: 'That on the first day of January, A. D. 1886, Alexander Cruikshank, one of the defendants, and one J. C. Shurtz, made a pretended location of a mining location called the Stewart lode or mining claim. That said location was attempted to be made by posting a notice at or near some work that had been done and performed some years prior thereto upon a mining location known as and called the Lilly lode or mining claim; but at the time of the pretended location of said Stewart lode or mining claim, the said pretended locators thereof made no discovery of any vein, lode, or ledge

of rock in place bearing valuable mineral, nor did they at any time make such discovery prior to the location of the Big Foot lode by Martin Sands and Gregory Cruikshank on the 20th day of September, 1891.'"

The court therefore found that the territory had remained public domain, notwithstanding certain acts of location had been done because the discovery had not in fact been made.

In Tuolumne Con. Mining Co. v. Maier, 66 Pac., 863, the Supreme Court of California in a controversy between a mining claim and a right of way for a ditch over the territory within the claim, rendered an opinion in which they held:

> "As to the other finding, we think the evidence fails to show that the Buena Vista mine was 'duly located,' as against plaintiff's right to maintain his ditch, for the reason that there is no evidence of any discovery of minerals until after plaintiff's right to maintain his ditch thereon had attached. We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon. Erhardt vs. Boaro, 113 U. S., 535, 5 Sup. Ct. 560, 28 L. Ed., 1113; O'Reilly vs. Campbell, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed., 669. And, for the purposes of this case, it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may here be conceded that a previous location may be made valid by a subsequent discovery of mineral; still there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery." * * * * * *

We have quoted extracts from the last three cases cited, not because they are the only cases, or the chief cases, thus holding, but because they are recent decisions of courts in states where the questions are familiar, where courts and counsel are frequently brought in contact with these questions, and they exhibit what has come to be the accepted

interpretation of the federal statutes and the decisions upon these subjects, and are in perfect accord with the decision of the Circuit Court of Appeals in this case.

Counsel, in their opening brief, made a spirited and positive contention that the Circuit Court of Appeals had misquoted, misapprehended and misunderstood the record in this case, and the allegations of the answer upon the subject of whether there had been, in fact, a discovery within the Ocean Wave and Little Mary claims prior to the location of the tunnel site. We thought all controversy on that subject had been removed from this discussion when we cited extracts from the opinion of the Circuit Court of Appeals, from the brief of opposing counsel, and from the record upon that subject at pages 12-15 of our brief. Counsel, however, cling tenaciously to this contention for the reasons, we think, to which we invited attention in our original brief. They now, however, shift their ground, and instead of maintaining that the answer did not deny the making of a discovery before the location of the tunnel site, and did not, in the affirmative matter therein contained, assert that such a discovery was made long after the location of the tunnel site, indulge in an elaborate discussion of the meaning of "pretended" when applied to the discovery and the location. This is found at page 3 of their printed brief, and interprets the answer to give date to the pretense and not to the discovery.

The present claim would be amusing if it were not seriously presented in a grave controversy. No claim of this kind was made in the Circuit Court or Circuit Court of Appeals, although respondent, in his brief and at the trial by its allegations, and its offers of evidence, called attention to the claim that no discovery had been made upon or in the lode claim when the tunnel site was located, nor until long thereafter. (Printed Record, pages 20, 37, 86; Brief, page 6.) Counsel responded that this could not be inquired into, not that the answer did not properly raise the question. The position then was that the patent precluded inquiry, and for that reason the pleading was stricken and the evidence rejected. Now we are told in a contention, how earnest we will not suggest, that we have alleged that the *pretence* of the discovery was made after our location, and not that our

location was made at the time when there was no discovery or before the discovery upon which the petitioner relies. This distinction is certainly refined, acute and ingenious, but hardly need we add baseless, not even plausible, much less sound. The use of the word pretended, which means, as the courts have held and the statute and decisions have announced, "asserted," "*claimed*" without recognition of the correctness of the claim, and has been here employed as it is employed every day in pleadings, without criticism of any sort, without any excuse for the claim presented and urged by opposing counsel, that the allegation is to be applied to the time when the pretence was made, and not to the date when the pretended discovery was, in fact, made. The respondent employed the usual and recognized form of allegation in such matters, and what is said is, in effect that the alleged and pretended discoveries upon which the claims were based were made long after the location of the tunnel site, and that the lode claimants, at the time they pretended and claimed to have made their location, knew this to be the fact, and knew that the tunnel site had been located, and therefore made their alleged location subject thereto.

We have as early as the 32d of Henry the Eighth, a statute known as the "*Pretensed Title Statute*," which provides that no one shall sell or purchase any *pretended* right or title to land unless the vendor has received the profits thereof for one whole year before such grant, or has been in actual possession of the land, or the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. 4 Broom & H. Comm., 150.

We have also the expression of "*false pretenses*," in which the thing pretended is known to be false, and employed for the purposes of fraud.

Wharton's Criminal Law, sections 1130, 1175, 1186, 1189.

Broom's Common Law, 963.

Commonwealth vs. Drew, 9 Pick., 184-6.

In Chitty, and other standard works, on pleadings, we find the expression alleged grievance, or the pretended deed employed where parties are attacking a claim, and do not wish to concede the existence of the questioned fact.

In Webster's Unabridged Dictionary, title "Pretend," we find the following definition:

> "To put in a claim, truly or falsely; to allege a title; to lay claim, to strive after something; usually with to. 'Countries that pretend to freedom.' Swift."

In this connection it is to be observed, that not only in the answer is there a specific allegation, definitely that the discovery, the alleged or pretended discovery, or whatever it may have been upon which the petitioner based his rights subsequent, in point of time, to the location of the tunnel site, but that, also, there is a denial of any location or discovery. This is certainly a denial of any location or discovery prior to the tunnel location, and the fact that it may be broader than the respondent would be permitted to sustain, by proof, and that it would be limited to proof down to the time when the title passed from the government in the event that it originated ~~his~~ title thereafter, it certainly is the denial of any location down to the entry which is shown to have been more than a year after the location of the tunnel site.

We unite with counsel in the assertion that the question here involved is an important one, but we fail to see how the affirmance of the decision of the Circuit Court of Appeals can produce any dire results, or how it can unsettle titles, or can take away the surface, or can take away lode claims that have been located, since it can only maintain the right in the bore of the tunnel through territory in which it was run, upon location made before any discovery or acquisition of any right in the claims as lode claims was made. Petitioner's contention destroys the whole tunnels, while respondent preserves them, at the same time inflicts no serious injury upon lode claimants and the great public policy announced

in the statute with reference to tunnels is preserved, and the inducement to the development of the hidden resources of the government domain is held out undiminished in its force and attractiveness. This court has united with the Circuit Court of Appeals in announcing and approving this policy.

Enterprise M. Co. vs. Rico-Aspen M. Co., 167 U. S., 108; 66 Fed. Rep., 200.

Counsel seem to think that in some way they have broken the force of our citation of the opinion of the Circuit Court of Appeals in Evans vs. Durango L. & C. Co., 25 C. C. A., 531, by pointing out that Judge Sanborn, while concurring in the decision, dissented in that case on not the rule concerning relation, but its application in that case. It will be found that Judge Sanborn did not dissent from the doctrine, but from its application to the particular facts under consideration. The doctrine, as we contend for it, as shown in the cases we have cited from this court, and upon which opposing counsel make no comment, and the cases from this court cited in that opinion, maintain the same doctrine. We are unable to perceive the force of the allusion to Judge Sanborn's dissent as a means of weakening the logic of his argument in the case at bar. Had Judge Sanborn in that case taken a position diametrically opposed to that maintained by the court, and afterwards had acted upon that opinion in deciding this case, it would leave his opinion unweakened by that fact. It is not our province here to discuss the value of dissenting opinions. We have all noted, especially when they hold with us against a majority opinion which has destroyed our hopes, in our view the great force and vigor with which their reasoning is maintained and the overwhelming learning displayed in them.

But, after all, in this case counsel must either contend that the Circuit Court of Appeals was wrong in the Evans case, in stating the doctrine of relation, which we do not understand to be their position, or else that in some way Judge Sanborn in his dissent took a position which he has not taken in this case, and has thereby weakened the force and

persuasiveness of his argument. As to the force of his reasoning, as to the weight the opinion of that court, in which many mining questions have been considered and determined, shall have here, we shall now say nothing; but we may be permitted in this connection to claim that, even had the course of Judge Sanborn been that we understand to be imputed to him by counsel, it was perfectly proper. It is not for us to even intimate an opinion upon how long or in what manner a dissenting judge shall cling to and seek to maintain and assert a view which was powerless to control the decision of the court. We have often thought that no higher tribute was ever paid to judicial character than is given us by Judge Hopkinson in the portraiture of Bushrod Washington—a portrait unflattering the great merits and qualifications of that learned jurist, in which the eloquent biographer said:

> "He was wise as well as learned; sagacious and searching in the pursuit and discovery of truth, and faithful to it beyond the touch of corruption or the diffidence of fear; he was cautious, considerate and slow in forming a judgment, and steady, but not obstinate, in his adherence to it. No man was more willing to listen to an argument against his opinion, to receive it with candor, or yield to it with more manliness, if it convinced him of the error. He was too honest and too proud to surrender himself to the undue influence of any man, the menace of any power, or the seductions of any interest; but he was tractable as humility to the force of truth; as obedient as filial duty, to the voice of reason. When he gave up an opinion, he did not grudgingly or with reluctant qualifications and saving explanations; it was abandoned at once, and he rejoiced more than anyone at his escape from it. It is only a mind conscious of its strength and governed by the highest principles of integrity, that can make such sacrifices, not only without any feeling of humiliation, but with unaffected satisfaction."

If it should be contended that Judge Sanborn erred in his dissenting opinion, he has not unduly clung thereto, and in his dissent nothing can be found which militates against the clear reasoning of the opinion delivered by him for the court in which all the judges concur.

It can not now be contended that the doctrine of relation is not equitable in its nature, that it should not be confined to the accomplishment of justice rather than to the perpetration of wrong, or the assistance of fraud. It can not now be claimed that it may be invoked to injure the innocent and aid the wrong-doer. Our contention with reference to it, our citation of authorities concerning it and its manner of its application by the Circuit Court of Appeals, all fall within these limits, clearly and universally announced by all the courts as the true rule.

In Campbell vs. Ellett, 167 U. S., 118, and Enterprise M. Co. vs. Rico-Aspen M. Co., in 167 U. S., 108, this court held that a tunnel site location need not adverse the application for patent by a lode claimant. The court in those particular cases pointed out the needlessness thereof, and that no wrong could be done to the lode claimant by failure to require the adverse to be made. Reasoning was given why this was a sound interpretation of the statute. But the court did not limit the rule to the reasoning given, nor to the particular circumstances of that case, but announced a general rule. There is no provision in the statute that in certain cases a tunnel site claimant need not adverse. There is no provision in the statute that under any circumstances or in any case he shall adverse. Without statutory requirement of this nature, it does not exist. To assume that the court was limiting instead of giving reasons to support the rule that an adverse was not necessary or required, and to leave each case open to an investigation years afterwards of whether or not an adverse should have been filed, and to determine upon the peculiar facts of each particular case, resting largely in parole, this question would be to make another decision, to formulate another rule, and to put not only a strained, but a wholly unwarranted interpretation upon the

provisions of the federal statutes upon this subject and upon the decisions. The court has held that the adverse was not required to be made by the statute, has given reasons why, especially in the case before it, this was a just and equitable rule, but the reasons do not limit the rule to that particular case, nor leave any exceptions thereto, for, as good reasons in other cases might be presented as were presented by the court in that, and, in fact, the court announced a general, comprehensive, just and exceptionless rule, which is that the statute has not provided for or required adverse in any cases for a tunnel site location against a lode claim. This does not mean that where the tunnel site locator sees fit to go upon the surface and make a location based upon his underground discovery, that he may not apply for patent therefor and become involved in an adverse location. It does hold that the world being advised of the existence of the tunnel, and of the existence of its rights, go upon the public domain, is restricted in its extent as to what is left by awarding to the tunnel site location all which the statute gives it. Therefore, our response to counsel's interpretation of the cases mentioned is that, since the law has made no provision for adverses in cases of the character now under consideration, that of a tunnel site locator bore of the tunnel, the adverse is not required by statute, is not, therefore, required at all, and there is no power in the courts or the interior department to add to the requirements of the statutes.

It requires no argument to demonstrate that there was no surface conflict between the bore of the tunnel and the lode claimants, but at this later than the "ELEVENTH HOUR," counsel have taken the singular position that the certificate of the tunnel site provides that certain stakings which indicate the line of the tunnel and the limits within which its claims must exist, and that while it does not claim the surface, and acquired no rights thereby to the surface, yet this makes the surface conflict, and requires an adverse to be filed. When the certificate is read, it will be found that it contains no such claims. The singular result would

then be presented of an adverse in behalf of a claim which was never made, which had no existence, and of a party required to go into court and adverse there and have a determination of an unasserted and non-existent conflict.

The object of the stakes upon the surface, in the present case, could not interfere with the right of the lode claims, because they were not then discovered or located, nor at the time when the patent was issued, because, as this court and other courts have held, the stakes may be put upon the surface, as indicating the form or extent of the claim, even though the claimant has proceeded to patent, since no right is asserted to the surface, whatever included within the stakings.

Del Monte vs. Last Chance, 171 U. S., 55.
Morrison's Mining Rights (10th Ed.), 43.

Counsel frankly admitted, upon interrogation, at the oral argument, that, in fact, the location certificate secured no surface rights. We add that we are not now claiming, and have never claimed, such surface rights; that they are not the matters involved in this litigation, and that the rights we are asserting are as to the bore of the tunnel through the Ocean Wave and Little Mary claims, which are in no sense surface in their nature.

In response to our statement that there was no discovery in the Ocean Wave and Little Mary, petitioner replies that in this we are at variance with you, and our location certificate said "Yes." We answered: "But it did not speak truly, and what we now desire is an opportunity to ascertain the truth and very right of the matter. We maintain that you may not thus create a right by a subsequent recitation which is in fact untrue, and then protect this contention by an assertion of the inviolability of patents, and that they are not subject to collateral attack."

The Logan-Stratton case has been referred to (Reply Brief, page 18), and excerpts taken from the opinion of Judge Hallett thereon. The Logan claim had been withdrawn from the public domain before the attempt to run the tunnel. It was claimed that a recent state statute gave

the right to the tunnels to run through prior existing valid lode claims. The court held against this contention. It will be observed from the opinion, and that as held, that the territory had ceased to be public and was not subject to the tunnel rights under the statute, because it had been duly appropriated and withdrawn from the public domain prior to the attempt to assert tunnel rights therein. It is to be noted, however, that Judge Hallett did not hold in that case that a patent could be carried back upon the doctrine of relation to a discovery which was never proved, merely because a location certificate recited its existence.

An examination of counsel's authorities and discussion upon the question of estoppel will, we think, demonstrate the inapplicability of the one, and the failure of the other, to see the true contention we make and the effect of the authorities we cite. We can not now enter into a full discussion of this branch of the case, and feel that what we have done in this way in our original brief makes this unnecessary.

Having just received the brief of counsel in this case, and having, in the former brief and the oral argument, presented generally the main and controlling features upon which we rely, and believing that the Circuit Court of Appeals, in its opinion, has fully sustained, upon authority and reason, the position it took, we, without any further comment upon any of the matters contained in the brief of counsel for petition, with which we do not coincide, submit this case for the determination of the court.

Respectfully submitted,

GERALD HUGHES,
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SCOTT ASHTON,
Attorneys for Respondent.

Supreme Court of the United States.

No. 18.—October Term, 1904.

The Creede and Cripple Creek Mining and Milling Company, Petitioner, vs. The Uinta Tunnel Mining and Transportation Company.	On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 30, 1905.]

Mr. Justice Brewer delivered the opinion of the Court.

Certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, (119 Fed. Rep. 164,) reversing a judgment of the Circuit Court of the United States rendered upon a verdict of a jury directed by the court.

The action was originally brought by the Creede and Cripple Creek Mining and Milling Company as plaintiff against the Uinta Tunnel Mining and Transportation Company as defendant, in the District Court of the county of El Paso, Colorado, for the possession of certain mining claims and for damages. Equitable relief was also prayed. On motion of the defendant the action was removed to the United States Circuit Court for the District of Colorado, where, also on its motion, the pleadings were reformed and the action made one for the possession of the property and damages.

The plaintiff filed an amended complaint, alleging in substance that it was the owner in fee and in possession and entitled to the possession of the Ocean Wave and Little Mary lode mining claims—being survey lot No. 8192, evidenced by mineral certificate No. 338, the patent of the United States to said plaintiff for said claims bearing date December 21, 1893—that said claims were duly located and discovered on the 2d of January, 1892, and that the patent related back and took effect of that date for all purposes given and provided by the laws of the United States and the State of Colorado concerning mining claims.

Entry upon the claims and ouster of plaintiff by defendant by means of its tunnel were also alleged.

Thereafter the defendant filed its answer. Upon motion of plaintiff certain portions thereof were stricken out, and on the trial testimony offered by the defendant in support of the portions stricken out was rejected.

The matter to be determined is the sufficiency of the defences pleaded and stricken out. To appreciate them fully it is well to state some facts about which there is no dispute, and it is sufficient to state the facts in reference to one of the lode mining claims, as the proceedings in respect to the two were alike. On February 1, 1892, J. B. Winchell and E. W. McNeal filed in the office of the county clerk of El Paso County (the county in which the mining claim was situated) a certificate of location which, not verified by affidavit or other testimony, stated that they had on January 2, 1892, located and claimed, in compliance with the mining acts of Congress, 1,500 linear feet on the Ocean Wave lode, and gave the boundaries of the claim. By several mesne conveyances the title of Winchell and McNeal passed to the plaintiff. On August 5, 1893, the plaintiff made an entry of the claim in the proper land office of the United States, and, no proceedings in adverse being instituted, a patent therefor was issued to it on December 21, 1893. There is no reference in the patent to the discovery or the filing of the location certificate. The first appearance of the claim on the records of any office of the United States is the entry in the local land office of August 5, 1893, and the only prior record in any State office is the location certificate, unsworn to, filed February 1, in which the parties filing the certificate stated that they had discovered the lode on January 2, 1892. On February 25, 1892, a location certificate of the defendant's tunnel was filed in the office of the county clerk of El Paso County, which, verified by the oath of one of the locators, stated that on January 13, 1892, they had located the tunnel site by posting in a conspicuous place and at the entrance to the tunnel a notice of their intent to claim and work the tunnel; that they had performed work therein to the value of $270 in driving said tunnel and $80 in furnishing and putting in timbers, and that it was their *bona fide* intent to prosecute the work with diligence and dispatch for the discovery of lodes and for mining purposes. The certificate also contained a full description of the boundaries of the tunnel site as claimed.

In a general way it may be said that the defences which were stricken out were a priority of right and an estoppel. We quote these paragraphs from the answer:

"It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the act of Congress in reference to tunnel rights and subject to the laws of the State of Colorado in reference to the right to run tunnels through ground that may be patented, for the purpose of reaching territory that belongs to tunnel owners beyond such patented claims, and subject to the rights which the defendant The Uinta Tunnel Mining and Transportation Company and its grantors had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims that

it might cut or discover in driving said tunnel, as is guaranteed to the locator of said tunnel under and by virtue of section 2323 of the Revised Statutes of the United States; that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of the United States and of the State of Colorado, which authorize and provide for the location and prosecution of such tunnels and which define and determine the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with section 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims and to drive drifts therein and to follow said lode claims as located by this defendant and to reach lode claims so owned by this defendant, as hereinbefore and hereinafter stated.

"It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars ($125,000), and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars ($10,000).

"It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location, under and by virtue of the laws of the United States, and under the provisions of section 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of and in reliance upon said statute.

"That the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through and along said pretended Ocean Wave and Little Mary lodes and lode mining claims, but that, on the contrary, the plaintiff by its conduct and actions in the premises as hereinabove recited and set forth has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars ($135,000), and has permitted and allowed the defendant so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims until the same has ripened into such a license and permission as entitles the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lodes and lode mining claims, and that said license and permission is such that the defendant cannot be disturbed therein."

It was also alleged that the tunnel had been driven some 2,200 feet; that it entered the ground of the plaintiff at about 550 feet from its portal, and in running through that ground the tunnel was driven 625 feet, leaving the plaintiff's ground at about 1,175 feet from the portal; that after passing it the defendant discovered in the tunnel three or four blind lodes, which it duly located; and it was not until after the discovery and location of these lodes that the plaintiff commenced this action.

Was there error in striking out these defences? By section 2319, R. S., "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase." Until, therefore, the title to the land passes from the government the minerals therein are "free and open to exploration and purchase." A lode locator acquires a vested property right by virtue of his location, (*Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220,) but what is the extent of that property right? Section 2322 defines it as follows: "The locators . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." So that the vested property right of the locator is limited to the surface and the veins apexing within its boundaries. Undoubtedly, therefore, until the entry of the plaintiff's lode claims, and possibly until the issue of the patent, the defendant had the right to drive its tunnel through the subsurface of plaintiff's lode claims. That ground still remained the property of the government and was "free and open to exploration." By section 2320 it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." And by section 2324: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." Tunnel rights are granted by section 2323, which reads:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such

~~the vertical side lines of such surface locations.~~" The express grant to the locator made by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the Government the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the Government. ~~By section 2320~~

tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

It does not appear from the answer or testimony that the tunnel had reached the boundaries of the plaintiff's claims prior to the entry or even prior to the patent. For the purpose of this case, therefore, we must assume that, although its line had been marked out—a line extending through the plaintiff's ground—yet in fact no work had been done within such ground prior to the patent.

The propositions upon which the plaintiff relies are that discovery is the initial fact; that the patent when issued relates back to that initial fact and confirms all rights as of that date; that no inquiry is permissible as to the time of that discovery, it being concluded by the issue of the patent; that such time antedated anything done in or for the tunnel; that no adverse proceedings were instituted after it had applied for patent, and that, therefore, its right became vested in the ground, the same right which any other land owner has, and which could not be disturbed by the defendant by means of its tunnel. (*St. Louis Mining Company* v. *Montana Mining Company*, 194 U. S. 235.)

On the other hand, defendant contends that, as the first record in any office of the government was the record of the entry on August 5, 1893, the patent issued in an *ex parte* proceeding is conclusive only that every preceding step, including discovery, had then been taken; that it in fact located its tunnel site prior to any discovery or marking on the ground of plaintiff's claim; that it was not called upon to adverse plaintiff's application for a patent, because no patent is ever issued for a tunnel, and it had not then discovered any veins within its tunnel; that plaintiff, with full knowledge of defendant's tunnel location, permitted the driving of the tunnel through its ground and beyond, at an expenditure of $135,000, and made no objection until the discovery of the veins beyond its ground, and then for the first time and to prevent defendant from developing such veins brought this action, and that by such acquiescence it was now estopped to question defendant's use of the tunnel.

Obviously the parties divide as to the effect of plaintiff's patent. The Circuit Court held with the plaintiff, the Court of Appeals with the defendant. It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it relates to the initiation of the patentee's right and cuts off all intervening claims. It may also be conceded that discovery of mineral is the initial fact. But

when did the initial fact take place? Are all other parties concluded by the locator's unverified assertion of the date or the acceptance by the government of his assertion as sufficient with other matters to justify the issue of a patent? Undoubtedly, so far as the question of time is essential to the right, the patent is conclusive, but is it beyond that?

In order to reach a clear understanding of the question it seems necessary to consider the legislation. Three things are provided for, discovery, location and patent. The first is the primary, the initial fact. The others are dependent upon it and are the machinery devised by Congress for securing to the discoverer of mineral the full benefit of his discovery. Chap. 6 of Title 32, R. S., is devoted to the subject of "Mineral Lands and Mining Resources." The first section, 2318, reserves mineral lands for sale, except as expressly directed. The next provides that all valuable mineral deposits in government lands shall be free and open to exploration and purchase and the lands in which they are found to occupation and purchase. In the next it is declared that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim. The whole scope of the chapter is the acquisition of title from the United States to mines and mineral lands, the discovery of the mineral being, as stated, the initial fact. Without that no rights can be acquired. As said by Lindley, in his work on Mines, 2d ed., vol. 1, sec. 335:

"Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. 'Rewards so bestowed,' says Gamboa, 'besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends.'"

Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By section 2324, however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the State or Territory within which the district is situated. This is held to authorize legislation by the State. Thus in *Belk* v. *Meagher*, 104 U. S. 279, 284, it was said:

"A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations."

In *Kendall* v. *San Juan Mining Company*, 144 U. S. 658, 664, is this language:

"Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the State or Territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States."

See also *Erhardt* v. *Boaro*, 113 U. S. 527, 533, 534, 535; *The Butte City Water Company* v. *Baker*, 196 U. S.—

And many Territories and States (Colorado among the number) have made provisions in respect to the location other than the mere marking on the ground of the boundaries of the claim. So before a location in those States is perfected all the provisions of the State statute as well as of the Federal must be complied with, for location there does not consist in a single act. In Morrison's Mining Rights, (11th ed.) p. 37, the author, having primarily reference to the laws of Colorado, says:

"The location of a lode consists in defining its position and boundaries, and in doing such acts as indicate and publish the intention to occupy and hold it under the license of the United States. The formal parts of location include: 1, the location notice at discovery; 2, the discovery shaft; 3, the boundary stakes."

In *Smelting Company* v. *Kemp*, 104 U. S. 636, 649, Justice Field, referring to the fact that the terms "location" and "mining claim" are often indiscriminately used to denote the same thing, says by way of definition:

"A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules."

See also *Northern Pacific R. R. Co.* v. *Sanders*, 49 Fed. Rep. 129, 135.

The patent is the instrument by which the fee simple title to the mining claim is granted.

Returning now to the matter of location, the Colorado statutes in substance require—

"1. To place at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator and the date of the discovery.

"2. Within sixty days from the discovery, to sink a discovery shaft ten feet deep showing a well-defined crevice.

"3. To mark the surface boundaries by six posts, one at each corner and one at the center of each side line, hewed or marked on the side or sides in towards the claim.

"4. The disclosure of the lode in an open cut, cross cut or tunnel suffices instead of a ten-foot shaft.

"5. Within three months from date of discovery he must file a location certificate with the county recorder giving a proper description of the claim, and containing also the name of the lode, the name of the locator, the date of the location, the number of feet in length on each side of the center of the discovery shaft and the general course of the lode." (Morrison's Mining Rights, 11th ed. p. 59.)

The issue of a patent for a lode claim in Colorado is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes. The Supreme Court of that State has decided that the order is not essential, providing no intervening rights have accrued. In *Brewster* v. *Shoemaker*, 28 Col. 176, 180, it said:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one."

And that has been the general doctrine. In 1 Lindley on Mines (2d ed.) sec. 330, the author says:

"The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights. The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator. But if the boundaries are marked before discovery, the location will date from the time discovery is made."

In 1 Snyder on Mines, sec. 354, it is said:

"While the general rule is, as stated elsewhere in the foregoing sections, that a location must rest upon a valid discovery, yet a location otherwise good, with a discovery made after location and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery, and generally from the first act towards claim and appropriation—this by relation."

In Morrison's Mining Rights (11th ed.) p. 32:

"If a location be made before discovery, but is followed by a discovery in the discovery shaft, before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid."

In *In re James Mitchell*, 2 L. D. 752, it was held by Commissioner McFarland that, "although prior to location no discovery of mineral was made within the ground claimed, upon a subsequent discovery prior to application for patent the location became good and sufficient, in the absence of any adverse rights."

In *Reins* v. *Raunheim*, 28 L. D. 526, 529, Secretary Hitchcock declared that "it is immaterial whether the discovery occurred before or after the location, if it occurred before the rights of others intervened. *Erwin* v. *Perego et al.*, 93 Fed. Rep. 608."

Reference is made to the statement of Secretary Smith in *Etling* v. *Potter*, 17 L. D. 424, 426, as though that announced a different conclusion, that "a

location certificate is but one step, the last one, in the location of a mining claim." But a location certificate is simply a certificate required by the local statute or custom that some things have been done, and of course it must come after those things have been done.

Again, in the same volume, pp. 545 and 546, *Northern Pacific Railroad Company* v. *Marshall*, he said:

"In the location of a mineral claim, placer or lode, the first requirement of the law is a discovery. (Secs. 2319 and 2320 Rev. Stat.) All rights inuring to the benefit of the locators are based upon this initial act. (*Erhardt* v. *Boaro*, 113 U. S. 537; *United States* v. *Iron Silver Mining Company*, 128 Id. 673; *O'Reilly* v. *Campbell*, 116 Id. 418.) When, therefore, a legal location has been made on land returned as agricultural, the slight presumption in favor of the return of the surveyor general is, *ipso facto*, overcome, and the burden of proofs shifts to the party attacking such mineral entry. By such discovery and location it is demonstrated that the return was erroneous, and it would be trifling with physical facts to put the *onus* on the locator to present further evidence until it is shown that, as a matter of fact, he had no discovery."

But the question he was considering was simply as to the burden of proof between one claiming land returned as agricultural land and one claiming a portion thereof, as an apparently legal location of a mineral claim.

In *North Noonday Mining Company* v. *Orient Mining Company*, 1 Fed. Rep. 522, 531, Judge Sawyer, in charging the jury, said:

"I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid."

To the same effect was the charge of the same judge in *Jupiter Mining Company* v. *Bodie Mining Company*, 11 Fed. Rep. 666, 676.

In *Cedar Canyon Mining Company* v. *Yarwood*, 27 Wash. 271, the Supreme Court of Washington ruled that—

"In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary mark is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery. (*Nevada Sierra Oil Co.* v. *Home Oil Co.* [C. C.] 98 Fed. Rep. 673; *Erwin* v. *Perego*, 35 C. C. A. 482, 93 Fed. Rep. 608; *Jupiter Min. Co.* v. *Bodie Consol. Min. Co.* [C. C.] 11 Fed. Rep. 666; 1 Lindl. Mines, s. 335, and cases cited.)"

See especially *Erwin* v. *Perego*, cited in this quotation, decided by the Court of Appeals for the Eighth Circuit. Tending in the same direction

are *Thompson* v. *Spray*, 72 Cal. 528, 533; *Gregory* v. *Pershbaker*, 73 Cal. 109, 118; *Tuolumne Cons. Mining Co.* v. *Maier*, 134 Cal. 583, 585.

But what is the meaning of the statute? Its language is "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Does that require that a discovery must be made before any marking on the ground, especially when as under the Colorado statutes several other steps in the process of location are prescribed, or does it mean that no location shall be considered as complete until there has been a discovery? Bearing in mind that the principal thought of the chapter is exploration and appropriation of mineral, does it mean anything more than that the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location?

This may be looked at in another aspect. Suppose a discovery is not made before the marking on the ground and posting of notice, but is then made, and it and all other statutory provisions are complied with before the entry which is an application for the purchase of the ground, of what benefit would it be to the government to require the discoverer to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which under the law ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or, to go a step farther, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the steps necessary for a location in the statutory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit and awarding the property to the plaintiff therein on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location?

These suggestions add strength to the concurring opinion of three leading commentators on mining law, the general trend of the rulings of the department and decisions of the courts, to the effect that the order in which the several acts are done is not essential, except so far as one is dependent on another. Doubtless a locator does not acquire the right of exclusive possession unless he has made a valid location, and discovery is essential to its validity, but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right? It must be remembered that the discovery and the marking on the ground are not matters of record but *in pais*, and if disputed in an adverse suit or otherwise must be shown, as other like facts, by parol testimony. It must also be remembered that the certificate of location required by the Colorado

statutes need not be verified. The one in this case was not. A locator might, if so disposed, place the date of discovery before it was in fact made, and at any time within three months prior to the filing of the certificate.

But it has been said that the question has been decided by this court adversely to these views, and *Enterprise Mining Company* v. *Rico-Aspen Mining Company*, 167 U. S. 108, and *Calhoun Mining Company* v. *Ajax Mining Company*, 182 U. S. 499, are cited. In the former case the question was as to when a vein discovered in a tunnel must be located, and in the opinion (p. 112) we said:

"In order to make a location there must be a discovery; at least, that is the general rule laid down in the statute. Section 2320 provides: 'But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery—whether such discovery be made on the surface or in the tunnel."

But that comes far short of meeting the question before us. It is undoubtedly true that discovery is the initial fact. The language of the statute makes that plain, and parties may not go on the public domain and acquire the right of possession by the mere performance of the acts prescribed for a location. But the question here is whether, if there be both a discovery and the performance of all the acts necessary to constitute a location, the order in which these things take place is essential to the right of exclusive possession which belongs to a valid location?

In the Ajax case the contest was between mining claims on the one hand and a mining claim and tunnel site on the other. All the mining claims had passed to patent. The plaintiff in error, who was defendant below, held the junior patent issued upon a later entry, and the entries of plaintiff's claims were made and the receiver's final receipts issued prior to the location of the tunnel site. In other words, the defendant, admitting that its right to a tunnel had not been established by a location at the time of the entries of plaintiff's claims, sought to invalidate them by proof that there had been no previous discovery of mineral. This was refused by the trial court, and we sustained the ruling, saying (p. 510):

"The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

An entry, sustained by a patent, is conclusive evidence that at the time of the entry there had been a valid location and such valid location implies as one of its conditions a discovery, and the decision only went to the extent that this could not be challenged by one who at the time of the entry had made no location and therefore had acquired no tunnel right.

There is nothing in this ruling to conflict with the views we have expressed.

It would seem, therefore, from this review of the authorities as well as from the foregoing considerations that, as between the government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if at the time of the entry everything has been done which entitled the party to an entry, to wit, a discovery and a perfected location, the government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. In other words, the government does not, by accepting the entry and confirming it by a patent, determine as to the order of proceedings prior to the entry, but only that all required by law have been taken.

If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not any one who claims rights anterior to the entry and dependent upon that order show as a matter of fact what it was? One not a party to proceedings between the government and the patentee is concluded by the action of the government only so far as that action involves a determination. There is a determination by the fact of entry and patent that there was prior to the entry a discovery and a location. Having been so determined third parties may be concluded thereby.

But it may be said that when the time of a particular fact is concluded by an adjudication or when an opportunity is presented for such an adjudication and not availed of, the time as stated must be considered as settled; that when the plaintiff applied for its patent if there was any question to be made by the defendant of any statement of fact made in the location certificate, or other record, it should have been challenged by an adverse suit. Failing to do so the fact must be considered to be settled as stated. Undoubtedly, if in an adverse suit the time of any particular matter is litigated, the judgment is conclusive, and if the date of discovery stated in the plaintiff's location certificate had been challenged in an appropriate action brought by the defendant and determined in favor of the plaintiff, there could be now no inquiry. So, when the owner of a lode claim makes application for a patent and the owner of another seeks to challenge the former's priority of right on account of the date of discovery, it is his duty to bring an adverse suit, and if he fails to do so that question will be as to him concluded. Such is the purpose and effect of the adverse proceedings.

Is the same rule also applicable to a tunnel site? This opens up the question of what are the rights and obligations of the owner of a tunnel? And here these facts must be borne in mind. The owner of a tunnel never receives a patent for it. There is no provision in the statute for one, and none is in fact ever issued. No discovery of mineral is essential

to create a tunnel right or to maintain possession of it. A tunnel is only a means of exploration. As the surface is free and open to exploration, so is the subsurface. The citizen needs no permit to explore on the surface of government land for mineral. Neither does he have to get one for exploration beneath the surface for like purpose. Nothing is said in section 2323 as to what must be done to secure a tunnel right. That is left to the miners' customs or the State statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location. When the tunnel right is secured the Federal statute prescribes its extent—a tunnel 3,000 feet in length and a right to appropriate the veins discovered in such tunnel to the same extent as if discovered from the surface.

If the tunnel right was vested before a discovery in the plaintiff's lode claim the defendant ought to have the benefit of it. The plaintiff's right does not antedate his discovery, at least it does not prevail over any then existing right. But, it is said, the defendant did not adverse the plaintiff's application for a patent; that its omission so to do precludes it from now asserting a right prior to the date of discovery named in the certificate of location, just as a judgment in an adverse suit involving the question of date would have been conclusive. Is the owner of a tunnel who simply seeks to protect his tunnel and has as yet discovered no lode claim, bound to adverse an application for the patent of a lode claim, the lode of which was discovered on the surface? It is contended that the case of *Enterprise Mining Company* v. *Rico-Aspen Mining Company, supra,* decides this question. But in that case the line of the tunnel did not enter the ground of the lode claim but ran parallel with and distant from it some 500 feet, and we held that the mere possibility that in the line of the tunnel might be discovered a vein which extended through the ground of the distant lode claim did not necessitate adverse proceedings. Here the line of the tunnel runs directly through the ground of the plaintiff, and the question is distinctly presented whether, in order to protect the right to that tunnel, the defendant was called upon to adverse? Whatever might be the propriety or advantage of such action, the statute does not require it.

Sections 2325 and 2326 provide the manner of obtaining a patent and for adverse proceedings. The first commences: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner." This, obviously, does not refer to easements or other rights, nor the acquisition of title to land generally, but only to land claimed and located for valuable deposits. Then, after prescribing certain proceedings, the statute adds, "if no adverse claim shall have been filed with the register . . . it shall be assumed that the applicant is entitled to a patent . . . and that no adverse claim exists." The next section commences, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and

shall show the nature, boundaries, and extent of such adverse claims." The section then authorizes the commencement of an action by the adverse claimant and a stay of proceedings in the Land Department pending such action, and adds:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

Reading these two sections together it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of "land claimed and located for valuable deposits;" in other words, the decision of a conflict between two mining claims, a decision which will enable the Land Department without further investigation to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has a right to run it in the hope of finding a mineral vein. When one is found he is called upon to make a location of the ground containing that vein and thus creates a mining claim, the protection of which may require adverse proceedings. As the claimant of the tunnel he takes no ground for which he is called upon to pay, and is entitled to no patent. A judgment in adverse proceedings instituted by him (if such proceedings were required) might operate to create a limitation on the estate of the applicant for a patent to the mining claim, and, thus as it were, engraft an exception on his patent. But taking the whole surface the applicant is required to pay the full price of five dollars per acre with no deduction because of the tunnel. The statute provides for no reduction on account of any tunnel. The tunnel owner might be said to have established his right to continue the tunnel through the lode claim after patent, a right which he undoubtedly had before patent, or at least before entry. There is no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights. In *Deffeback* v. *Hawke*, 115 U. S. 392, 406, we said:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Other limitations on the full title granted by a patent for a mineral claim are recognized in the statutes. Thus, by section 2339, which is found in the same chapter as the other sections quoted, the one devoted to "Mineral Lands and Mining Resources," it is provided that:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

But it has never been supposed that the owner of any of these rights was compelled to adverse an application for a patent for a mining claim, for they are not "mining claims."

The decisions on the question of the duty of the tunnel owner to adverse the application of the lode claimant are not harmonious. In *Bodie Tunnel & Mining Company* v. *Bechtel Consolidated Mining Company*, 1 L. D. 584, Secretary Kirkwood held that a tunnel location was a mining claim and necessitated adverse proceedings to protect its rights as against an applicant for a lode claim, (see also *Back* v. *Sierra Nevada Con. Mining Company*, 2 Idaho, 420,) while the Supreme Court of Colorado in *Corning Tunnel Company* v. *Pell*, 4 Col. 507, denied the right of a tunnel owner to adverse the application for a patent for a lode claim where the lode had not been discovered in the tunnel and the discovery shaft was not on the line of the tunnel. Lindley, (sec. 725,) referring to the decision in *Enterprise Mining Company* v. *Rico-Aspen Mining Company*, *supra*, said:

"In the light of this decision and the one which it affirms, the rule may be thus formulated: Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode inures to the tunnel proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant; but where there has been no discovery in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim."

Without further review of the conflicting authorities, it would seem that whatever may be the propriety or advantage of an adverse suit, one can-

not be adjudged necessary when Congress has not specifically required it. Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface. Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

If the defendant was not estopped by a failure to institute adverse proceedings then the trial court erred in striking out the parts of the answer in reference to the date of plaintiff's discovery, and the judgment of the Court of Appeals was right.

This conclusion avoids the necessity of any inquiry as to the effect of the alleged estoppel, and the judgment of the Circuit Court of Appeals is affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.